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Untying a Judicial Knot: Examining the Constitutional Infirmities of Extrajudicial Service and Executive Review in U.S. Extradition Procedure

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NOTES

Untying a Judicial Knot: Examining the Constitutional Infirmities of Extrajudicial Service and Executive Review in U.S. Extradition Procedure

I. INTRODUCTION

Consider the following situation. An investment banker embezzles millions of dollars from a bank in Italy and transfers the funds to an account in the United States. While he is vacationing in

the United States, federal marshals apprehend him pursuant to a request by the Italian government. They bring him before a federal district court judge sitting as an extradition magistrate in the local federal courthouse. After determining that the evidence presented meets the requisite level of criminality, the judge declares that the banker is properly extraditable and binds the case over to the Secretary of State.

The President, however, wishes to express his displeasure with Italy's failure to lend assistance during a recent military maneuver. He sends a memo to the State Department indicating that the banker should not be surrendered to Italy. So as not to embarrass high-ranking officials of the Italian government, the Secretary of State issues a statement specifying that the extradition magistrate incorrectly concluded that sufficient evidence of criminality existed.

From the perspective of the hypothetical banker and other individuals accused of committing crimes in foreign jurisdictions, the prospect of this type of executive reprieve would seem a welcome possibility.[1] Recently, though, one individual awaiting extradition[2] from the United States successfully argued in federal district court that the possibility of such review violated accepted principles of separation of powers.[3] Specifically, he argued that the statute governing extradition afforded members of the executive branch the opportunity to review and revise decisions of federal judges sitting as extradition magistrates. While this position has not been adopted in other jurisdictions,[4] it has created uncertainty in current extradition

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1. Although the Secretary of State may decline to surrender the individual once the individual has been found extraditable by the extradition magistrate, the Secretary may not surrender an individual if the magistrate determines that sufficient evidence does not exist to warrant extradition. 18 U.S.C. §§ 3184 et seq. 1994 ed. In other words, the prospect of review by the Secretary of State can only inure to the benefit of the accused. One court has found this to be a relevant factor in denying the potential extraditee standing te challenge the constitutionality of the statute. See *Matter of Extradition of Lang*, 905 F. Supp. 1385, 1392 (C.D. Cal. 1995).

2. "Extradition is the process by which a person charged with or convicted of a crime under the law of one state is arrested in another state and returned for trial or punishment." Restatement (Third) of Foreign Relations Law of the United States § 474 at 556-57 (1987).

3. *Lobue v. Christopher*, 893 F. Supp. 65 (D.D.C. 1995). The D.C. Circuit vacated and remanded Judge Lamberth's controversial decision mandating dismissal for lack of jurisdiction. *Lobue v. Christopher*, 82 F.3d 1081 (D.C. Cir. 1996). The circuit court, therefore, did not reach the issue of whether the procedure governing extradition violated separation of powers.

4. Each federal court that has subsequently considered the issue has disagreed with the conclusion reached in *Lobue*. See, for example, *LoDuca v. United States*, 1996 U.S. App. LEXIS 22208 (2d Cir. Aug. 29, 1996); *Werner v. Hickey*, 920 F. Supp. 1257 (M.D. Fla. 1996); *Matter of Extradition of Lin*, 915 F. Supp. 206 (D. Guam 1995); *Matter of Extradition of Lang*, 905 F. Supp. 1385 (C.D. Cal. 1995); *Matter of Extradition of Sutton*, 905 F. Supp. 631 (E.D. Mo. 1995); *Cherry v. Warden*, 1995 U.S. Dist. LEXIS 14828 (S.D.N.Y. Oct. 6, 1995); *Matter of Extradition of Sidali*, 899 F. Supp. 1342 (D.N.J. 1995); *Carreno v. Johnson*, 899 F. Supp. 624 (S.D. Fla. 1995).

proceedings and has affected the negotiation of several extradition treaties.[5] Moreover, in light of the fact that the statute is nearly one hundred fifty years old, a finding of unconstitutionality was novel and unexpected.[6] Because the opinion declaring the extradition procedure unconstitutional was later vacated at the appellate level for lack of jurisdiction,[7] the appellate court did not reach the issue of whether the procedure violated separation of powers, essentially leaving this an open issue for subsequent consideration. This Note will endeavor to undertake such a consideration.

The ultimate lack of an analytical coherence in the Supreme Court's treatment of separation of powers issues unfortunately makes it difficult to predict the outcome of any given case.[8] While each of the

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5. The impact of Judge Lamberth's ruling was immediately felt by the State Department, as the extradition of a notorious criminal to Peru was temporarily delayed by a federal court in Florida. Toni Locy, *Judge Prohibits Extraditions by U.S.; State Department Voices Concern About Impact on Foreign Policy*, Wash. Post A9 (Sept. 16, 1995) ("It is unclear how many other fugitives could be affected by [Judge] Lamberth's order."); Editorial, *Separate Nations, Separate Powers*, St. Louis Post-Dispatch 14B (Sept. 16, 1995) ("Though the decision is immediately binding only on [those involved in the case before Judge Lamberth], it threw into question extradition proceedings involving about 250 people wanted on criminal charges in other countries."). See also Op-Ed, *Extradition*, Wash. Post A18 (Sept. 23, 1995) ("Government lawyers should be preparing an amendment to the extradition statute for congressional consideration .... If Judge Lamberth's ruling is upheld, a bill should be ready for the Hill.").

The practical implications of the ruling extended well beyond the actual surrender of individuals to foreign countries to stand trial. Government officials indicated that foreign policy decisions and the negotiations of several extradition treaties were adversely affected. Thomas W. Lippman, *Judge's Bar on Extradition Draws Officials' Complaints; Cases, Treaty Talks Disrupted While U.S. Appeals*, Washington Post at A2 (Sept. 21, 1995). The problems caused by this decision were compounded when Judge Lamberth expanded his original ruling and barred the government from sending any suspects to another country to stand trial. Locy, Wash. Post at A9 (cited in this note). However, the expansion of the original ruling was expeditiously overturned by the D.C. Circuit Court. Toni Locy, *Court Suspends Ruling Barring U.S. Extradition; Statute to Remain in Force During Appeal*, Wash. Post A3 (Sept. 30, 1995).

6. Toni Locy, *Law Permitting Citizens to Be Extradited for Foreign Trials Is Struck Down*, Wash. Post A14 (Sept. 1, 1995) ("A federal judge yesterday struck down the U.S. extradition law that, for more than 150 years, has allowed Americans accused of committing crimes abroad to be sent to foreign countries to face punishment.... Justice Department lawyers had argued the extradition law had withstood the test of time and should remain intact."). Judge Lamberth responded to appeals to defer to the constitutionality of the law due to its longevity: "It is certainly unfortunate that this fundamental flaw (in the law) has gone unnoticed for so long; however, the court will not further compound this error by a turning a blind eye to the statute now." George Graham, *Extradition Rules in Doubt*, Financial Times 3 (Sept. 1, 1995) (quoting Judge Lamberth).

7. In vacating Judge Lamberth's opinion, the D.C. Circuit Court explained that the district court lacked jurisdiction over the matter. *Lobue*, 82 F.3d at 1081 (D.C. Cir. 1996). The court indicated that general declaratory relief could not be used to challenge a federal law, due to its displacement by specific habeas corpus relief. Id.

8. See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. Pa. L. Rev. 1513, 1517 (1991) ("[T]he Supreme Court's treatment of the constitutional separation of powers is an incoherent muddle."); Stephen L. Carter, *From Sick Chicken to* Synar: *The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. Rev. 719, 722-43 (indicating that the Court has failed to establish a coherent analytical approach in the area of

differing philosophies on how such issues should be treated has some degree of merit—from formalism, with its pristine and textualist perception of the Constitution, to functionalism, with its pragmatic flexibility—selection of one method of analysis over another has the potential to render a markedly different result.[9] This is not the case, however, when the constitutionality of United States extradition procedure is assessed. Current United States extradition procedure cannot survive constitutional scrutiny under either a formalist or a functionalist analysis.

The internal procedure culminating in the extradition of an individual from the United States to a foreign nation is an intriguing system characterized by vague delineations of power among the three branches of the federal government.[10] The statute governing extradition creates constitutional problems of executive review and extrajudicial service by requiring members of the judicial branch to render non-binding, reviewable determinations of extraditability while sitting as extradition magistrates.[11] These problems have been created by the ambiguous wording of the statute, and more dramatically by the manner in which the statute has been interpreted. Examining the constitutionality of the statute requires more than the interpretation of a few words and a characterization of the roles played by the executive and the judiciary. It necessitates an analysis of why both the executive and the judiciary are involved and an assessment of how the performance of their assigned duties impacts their status as separate branches of the federal government. Such an evaluation demonstrates that as it now stands, federal extradition procedure violates the principle of separation of powers.

Part II of this Note briefly sets forth the competing positions courts have adopted in undertaking constitutional scrutiny of the

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separation of powers); Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers—A Foolish Inconsistency?*, 72 Cornell L. Rev. 488, 526 (1987) (commenting that the Supreme Court's disparate treatment of separation of powers issues demonstrates inconsistent reasoning).

9. Formalism and functionalism are terms which scholars have adopted in describing the Supreme Court's treatment of separation of powers issues. While any particular Justice would be reluctant to cast himself or herself as a formalist or functionalist, opinions by the Court in separation of powers cases usually fit within one of these particular characterizations. For further discussion of the formalist and functionalist approaches, see Parts IV.A. and IV.B.

10. See 18 U.S.C. §§ 3184 et seq. (1994 ed.) (governing the procedure for extradition of an individual from the United States).

11. "Extradition magistrate" is a descriptive term encompassing those judges who have been authorized to conduct extradition proceedings. These judges include members of the federal judiciary (Article III judges), federal magistrate judges under the supervision of a federal court, and state court judges. Id. § 3184. For purposes of this Note, discussion is confined te members of the federal judiciary unless otherwise indicated.

current extradition statute. Part III examines the roles played by the executive and the judiciary in the extradition process. Part IV subjects the procedure to the traditional formal and functional tests employed by the Supreme Court when dealing with separation of powers issues and culminates in an analysis of the inherent strengths and weakness of each test. This Note ultimately concludes that the extradition procedure cannot withstand constitutional scrutiny and briefly describes two potential solutions.

II. CURRENT EXTRADITION LITIGATION: PROBLEMS AND POSITIONS

Article III judges serve on federal courts with life tenure and salary protections. The federal extradition statute vests these judges with the authority to sit as extradition magistrates and to determine issues of extraditability upon request from a foreign nation.[12] If an individual is found to be properly extraditable, the magistrate certifies this determination to the Secretary of State, who ultimately decides whether to surrender the individual to the requesting state.[13] The decision rendered by the Secretary of State has become the cornerstone of constitutional challenges to this process as it is perceived as an impermissible review of a judicial determination by the executive.

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12. The statute provides, in relevant part:
Whenever there is a treaty or convention for extradition hetween the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered.
Id.

13. The statute further indicates:
If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according te the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.
Id.

A. The Impetus for a Constitutional Examination: Lobue v. Christopher

1. The Facts of the Case

Pursuant to the extradition treaty in place between the United States and Canada, Canadian officials requested the extradition of individuals allegedly involved in a kidnapping incident.[14] The Secretary of State properly forwarded this request to the United States Attorney for the Northern District of Illinois, the jurisdiction in which officials believed the kidnappers resided, and extradition proceedings commenced.[15] After the required extradition hearing, the extradition magistrate determined that the individuals involved in the alleged kidnapping were properly extraditable.[16] The District Court for the Northern District of Illinois then granted a stay of the order of surrender to allow for the filing of a habeas corpus petition.[17] Despite this order, Deputy Secretary of State Strobe Talbot signed the surrender warrant authorizing the extradition to Canada.[18] The individuals slated for surrender to Canada filed an action in the District Court for the District of Columbia seeking a declaratory judgment and injunction challenging the constitutionality of the extradition statute.[19]

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14. In December 1987, Anthony DeSilva and his wife, Tammy, were involved in an automobile accident leaving Ms. DeSilva paralyzed and mentally disabled. As a consequence of Mr. DeSilva's filing of a personal injury lawsuit in Illinois, his wife, who at the time was being cared for by her mother in Canada, was required to undergo a medical examination as part of discovery in the case. Mr. DeSilva and other co-workers from the Chicago area traveled into Canada with the intention of bringing Ms. DeSilva back to the United States. Upon attempting to re-cross the border, Mr. DeSilva was stopped by United States Claims officers, who had been notified by the Winnipeg police that he had illegally abducted his wife. While Mr. DeSilva and the other men were allowed to return to the United States, Ms. DeSilva remained in Canada and subsequently requested that the individuals, including her husband, be charged with a criminal offense. *Matter of Extradition of Kulekowskis*, 881 F. Supp. 1126, 1129-35 (N.D. Ill. 1995).

15. Id.

16. Id. at 1149. A detormination of extraditability usually requires the following determinations: (1) that the offense charged is included in the extradition treaty as an extraditable offense; (2) that the alleged offense is considered criminal in both the requesting stato and the United States; and (3) that a certain level of evidence exists indicating that the accused committed the crime. See Part III.A.2.

17. *Lobue*, 893 F. Supp. at 67.

18. Id.

19. Id. at 65.

2. The District Court's Consideration of the Issue and Holding

The accused individuals (now plaintiffs) argued that the current extradition statute created a scheme granting the executive branch power to review and revise determinations of extraditability made by Article III judges sitting as extradition magistrates.[20] The government responded by defining the process of extradition as encompassing two distinct functions—first, the judicial determination of extraditability and second, the executive decision to extradite.[21] In the end, the court adopted the plaintiffs' assessment of the extradition procedure.[22]

The court defined the issue in this case as whether a statute may confer upon the executive, in the person of the Secretary of State, the authority to review determinations of extradition magistrates.[23] The court determined that the discretion exercised by the Secretary of State did, indeed, result in an executive review of a judicial finding.[24] Rejecting the government's plea for the court to rely on the more flexible functional approach to separation of powers adopted by the

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20. See *Plaintiff's Surreply to Defendant's Motion to Dismiss* at 4, *Lobue v. Christopher*, 836 F. Supp. 65 (D.D.C. 1995) (on file with the Author). Plaintiffs argued that this violated separation of powers because the extradition magistrate's determination was essentially an advisory opinion. The Supreme Court has specifically stated that the decisions of Article III judge may not be revised by members of either the executive or legislative branches. See *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1453, 131 L. Ed. 2d 328 (1995) ("Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch."). Nor may Article III judges issue opinions which do not bind the parties involved in the case or controversy before the court. See *Flast v. Cohen*, 392 U.S. 83 (1968).

21. The Government indicated:

> Contrary to plaintiff's view, the Secretary of State does not "revise[ ], overturn[ ], or refuse[ ] faith and credit" to the extradition judge's determination. The extradition judge's certification is not that the extradition *must* occur, but simply that it is lawful to hold and extradite the fugitive under the extradition treaty. As argued previously, this is functionally the same as the determination that it is lawful to conduct a search, arrest a person, or hold him to answer certain criminal charges. The ultimate decision whether to carry out an extradition is, however, a political and foreign policy determination committed to the executive branch. Consequently, it would be beyond any judicial officer's power to compel the Secretary of State, by virtue of the certification of extraditability, to exercise his discretion in favor of extradition.

Defendant's Motion to Dismiss, at 25, *Lobue v. Christopher*, 836 F. Supp. 65 (D.D.C. 1995) (on file with the Author).

However, the government's opinion neglects historical evidence demonstrating that the Secretary of State has reviewed and reversed the legal determinations of extradition magistrates in deciding whether to surrender accused individuals to requesting nations. See Part III.B.3.

22. *Lobue*, 893 F.Supp at 78.

23. Id. at 68.

24. Id. at 68-70.

Supreme Court in cases such as *Mistretta v. United States*[25] and *United States v. Nixon*,[26] the court determined that the statute at issue could not withstand separation of powers scrutiny.[27] The court recognized that the judge's determinations were neither final nor binding on the executive and concluded that the extradition statute contravened the intended reach of the constitutional power vested in the executive.[28] The court interpreted the certification of the extradition magistrate as the final word of the judiciary on the question of extraditability and as such, "[s]ubjecting the final determinations of the Judiciary to Executive Branch review in this manner [was perceived to be] manifestly unconstitutional."[29]

*B. Post-*Lobue *Consideration of the Process of Extradition*

Not suprisingly, numerous individuals facing the prospect of extradition from the United States have invoked the holding in *Lobue* as a constitutional bar to their extradition.[30] Unfortunately for these individuals, the judiciary has generally turned a deaf ear to these arguments.[31] These subsequent decisions do not reflect a rejection of the basic principle relied on in *Lobue*, namely that executive review of judicial decisions is unconstitutional. Rather, these cases reflect a different interpretation of the roles played by the respective branches in the process of extradition.

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25. 488 U.S. 361, 382 (1989) (examining the separation of powers issues and judicial participation in the Federal Sentencing Commission). The government relied on supreme court holdings evincing a willingness to permit the intermingling of the three branches of the general government so long as the authority and independence of each branch is effectively preserved. Moreover, the government put forth the contention that the Framers never intended to create three hermetically sealed branches of government, each completely separate from the others.

26. 418 U.S. 683, 707 (1974) (indicating that the three branches of government have never been required to "operate with absolute independence"). The government also alluded to the Court's holdings in both *Morrison v. Olson*, 487 U.S. 654 (1988) and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), in asserting the principle that the Constitution did not contemplate absolute and total separation of powers. *Government's Reply* at 19.

27. *Lobue*, 893 F. Supp. at 78.

28. Id. at 71.

29. Id. at 75.

30. In several cases, individuals facing extradition argued that the procedure violated separation of powers. See *Werner v. Hickey*, 920 F. Supp. 1257 (M.D. Fla. 1996); *Matter of Extradition of Lin*, 915 F. Supp. 206 (D. Guam 1995); *Matter of Extradition of Lang*, 905 F. Supp. 1385 (C.D. Cal. 1995); *Matter of Extradition of Sutton*, 905 F. Supp. 631 (E.D. Mo. 1995); *Cherry*, 1995 U.S. Dist. LEXIS 14828 at *1 *Matter of Extradition of Sidali*, 899 F. Supp. 1342 (D.N.J. 1995); *Carreno v. Johnson*, 899 F. Supp. 624 (S.D. Fla. 1995).

31. Each court cited in note 30 determined that the extradition statute was constitutional.

Many district courts have relied heavily on principles of statutory interpretation in reaching their conclusions.[32] In most cases, courts have focused on a "plain reading" of the extradition statute and have found that the statute on its face does not confer an impermissible review power on the Secretary of State.[33]

Other courts have found the statute constitutional in light of the differing roles performed by the respective branches in the extradition process.[34] This interpretation defines the role of the extradition magistrate as reaching a final, non-reviewable conclusion on the threshold issue of whether extradition would be lawful. The extradition hearing is compared to a preliminary criminal hearing,[35] and the decision to extradite is viewed as one of many factors considered by the executive in ultimately reaching a foreign policy conclusion.[36] Although courts considering this issue have selected a

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32. See *Lang*, 905 F. Supp. at 1391; *Sutton*, 905 F. Supp. at 635; *Carreno*, 899 F. Supp. at 629-30.

33. See *Lang*, 905 F. Supp. at 1391 ("The court is not convinced that the extradition statute creates executive revision."); *Sutton*, 905 F. Supp. at 635 ("[T]his court finds the plain language of the statute does not confer an impermissible power of review upon the Secretary"); *Carreno*, 899 F. Supp. at 630 ("Therefore, the court finds no support in the language of the statute itself for the proposition that the statute confers an impermissible power of review upon the Secretary of State.").

Although concentrating on a plain reading of the statute reveals no apparent constitutional problems, the manner in which courts have interpreted the language of the statute clearly implicates separation of powers concerns not readily apparent from the statute's text. See Parts III.A.3. and III.B.3. Thus, the unconstitutionality of the statute is derived from the language of the statute indirectly, in that the ambiguity of the statute has afforded its interpreters the opportunity to convey impermissible power upon members of the executive and judicial branches of the federal government. For the language of the statute at issue, see notes 12 and 13.

Quite separate from the statutory interpretation relied on in the cases above, was the unique approach adopted by a California district court's opinion in *Lang*. Although this court did indicate that it would reject a separation of powers argument in the case on plain reading grounds, the court also noted that the petitioner did not have standing to raise the issue due to the fact that the review hy the executive could only inure to the benefit of the accused. *Lang*, 905 F. Supp. at 1391-99.

34. See *Cherry*, 1995 U.S. Dist. LEXIS 14828 at *7 (performing an analysis of the roles of the extradition magistrate and executive and indicating "the fact that the testimony at extradition hearings is reviewed by a member of the executive branch is not violative of the separation of powers doctrine"); *Sidali*, 899 F. Supp. at 1350.

35. The comparison of an extradition hearing to a preliminary criminal hearing does have the support of some appellate courts. See, for example, *Ward v. Rutherford*, 921 F.2d 286, 288 (D.C. Cir. 1990) (indicating that "an extradition hearing . . . is akin to a preliminary examination"); United States v. Kember, 685 F.2d 451, 455 (D.C. Cir. 1982).

36. In *Cherry*, the court indicated as follows:

> An extradition hearing is a preliminary hearing conducted to honor the treaty obligations of the United States negotiated and ratified by the executive and legislative branches. It is not an adjudication of guilt or innocence. In an extradition hearing the magistrate judge decides whether extradition would be lawful. He or she is not making a final determination that extradition should or should not be carried out, a determination which may involve foreign policy considerations. Therefore, the fact that

relatively straightforward approach, they have chosen to ignore substantial historical evidence of executive review and revision of extraditability determinations made by federal judges sitting as extradition magistrates.[37]

Irrespective of which viewpoint is adopted, extradition requires complicated interaction among the three branches of the federal government before an individual is surrendered to the requesting state. Accurately characterizing the functions that each branch performs is therefore an essential prerequisite to a separation of powers analysis.

III. EXTRADITION PROCEDURE WITHIN THE UNITED STATES

Throughout its history, the United States has entered into numerous extradition treaties.[38] In the absence of express enabling legislation, the executive was initially charged with ensuring that these international obligations were fulfilled. Congress, however, eventually curtailed executive dominance in this area by introducing a judicial role in the process through the creation of the extradition magistrate. For nearly 150 years, the extradition of individuals to foreign countries from the United States has been governed by the procedures codified in 18 U.S.C. section 3184. Legislative adoption of these procedures was an effort to protect individual liberties by guaranteeing judicial oversight of the extradition process.[39] Although the extradition legislation enacted by Congress expressly defines the roles of the executive and the judiciary, courts and commentators

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the testimony at extradition hearings is reviewed hy a member of the executive branch is not violative of the separation of powers doctrine.

1995 U.S. Dist. LEXIS 14828 at *7. See also *Sidali*, 899 F. Supp. at 1350 ("In passing, the court simply notes its belief that the function of the Secretary of State is not to 'review' a judicial decision but rather is something wholly different. The executive decision is much more expansive than the judicial decision. The Executive Branch must consider a wider variety of factors in determining whether to actually extradite an individual once a certificate of extraditability has been issued.").

37. See Part III.B.3 for a description of incidents of executive review and revision throughout history.

38. In 1794, for example, the United States entered into the Treaty of Amity, Commerce, and Navigation with Great Britain. This treaty provided for the extradition of individuals charged with murder or forgery and marked the first American treaty provision expressly dealing with the subject of extradition. Treaty of Amity, Commerce, and Navigation, Art. 27, 8 Stat. 116, Treaty Ser. No. 105 (1794), reprinted in Hunter Miller, ed., 2 *Treaties and Other International Acts of the United States of America* 263 (U.S. G.P.O., 1931)) ("Jay Treaty"). Since this time, the United States has entered into treaties or has been a member to conventions providing for extradition with nearly every nation in the world.

39. See *Matter of Mackin*, 668 F.2d 122, 126 (2d Cir. 1981) ("The prime purpose of the 1848 statute . . . was to provide additional judicial officers to handle extradition requests.").

have interpreted this legislation in a manner not readily apparent from the text of the statute and contradictory to the principle of separation of powers.[40]

A. The Judicial Process

1. Judicial Involvement: Origins and Rationale

Extradition procedure within the United States originally failed to contemplate a distinct role for the judiciary. This absence of judicial involvement was apparent in the very first case involving the extradition of an individual from the United States. The lack of judicial input resulted in criticism sufficient to cause the defeat of an incumbent in a presidential election and essentially to cripple American extradition procedure for nearly fifty years. The first reported extradition case, *United States v. Robbins*,[41] involved the United States' surrender to Great Britain of an individual accused of participating in a mutiny aboard a British vessel. United States extradition law at the time consisted of the international obligation to extradite pursuant to the Jay Treaty and the Supremacy Clause[42] which rendered this treaty the law of the land. Federal courts had no constitutional or legislative jurisdiction over extradition, demonstrating a complete lack of a domestic extradition framework.[43] Nevertheless, the Secretary of State, acting on behalf of President John Adams, advised and requested that a federal district judge in South Carolina surrender Robbins to the British.[44] The district court relied on this executive request in concluding that Robbins would be properly extraditable, though neither the treaty with Great Britain nor any legislation at the time formed a legal basis for the President's action.[45]

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40. See notes 12 and 13 for the text of the statute at issue. Though the statute at issue neither expressly authorizes executive review of judicial determinations nor directs Article III judges to serve in an extrajudicial capacity, interpretations of the statute have allowed such practices to occur.

41. 27 F. Cases 825 (No. 16,175) (D.S.C. 1799).

42. U.S. Const., Art. VI, cl. 2 (indicating that treaties made under the authority of the United States "shall be the supreme Law of the Land").

43. Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 Yale L. J. 229, 288 (1990).

44. *Robbins*, 27 F. Cases at 826-27.

45. Id. at 827. Upon Judge Bee's determination, "the irons were placed on the prisoner" and he was surrendered to British officials. He was hanged not long after this surrender. Wedgwood, 100 Yale L. J. at 287-99 (cited in note 43).

Against a backdrop of anti-English sentiment and disapproval of the centralized strength of the British Crown, Thomas Jefferson extensively criticized the manner in which President Adams handled the extradition of Robbins, calling the President's action an infringement on the powers and independence of the judiciary.[46] Moreover, the remarkable thought of allowing the executive to pull an individual off the street for surrender to a foreign nation without any judicial function appeared highly dangerous to liberty.[47] *Robbins* thus became the impetus for the inclusion of an express role for the judiciary in subsequent extradition treaties and legislation.[48] Formal judicial involvement was designed to prevent executive usurpation of judicial authority and to provide for the protection of the liberty interests of individuals faced with the prospect of extradition.[49] Specifically, the task of determining extraditability has been assigned to the courts by legislation so as to protect fundamental individual rights and liberty.[50]

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46. See M. Cherif Bassiouni, 1 *International Extradition: United States Law and Practice* ch. 2 at 48-49 (Oceana, 1987); Michael Abbell and Bruno A. Ristau, 4 *International Judicial Assistance* § 13-1-1 at 3-4 (International Law Inst., 1990); Jaques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 Cornell L. Rev. 1198, 1206-07 (1991).

47. See Wedgwood, 100 Yale L. J. at 316 (cited in note 43). See also *In re Kaine*, 55 U.S. 103, 112 (1852) ("[E]xtradition without an unbiased hearing before an independent judiciary [is] highly dangerous to liberty.").

48. The Supreme Court has recognized the inherent protection offered by an Article III adjudication of cases and controversies and has stated: "The Framers of the Constitution had a similar understanding of the judicial role, and as a consequence, they established that Article III judges would be appointed, rather than elected, and would be sheltered from public opinion by receiving life tenure and salary protection." *Chisom v. Roemer*, 501 U.S. 380, 400 (1991). Similar protections are non-existent when decisions are made by either the executive or legislative branches.

49. *Austin v. Healy*, 5 F.3d 598, 604 (2nd Cir. 1993) ("[W]e agree that 'extradition without an unbiased hearing before an independent judiciary is highly dangerous to liberty' ") (quoting *In re Kaine*, 55 U.S. 103, 112 (1852)).

50. The provision governing extradition in the Jay Treaty lapsed in 1807, and the United States was then without an extradition treaty with Great Britain or any other nation in the world. Since the executive was not otherwise authorized to extradite an individual, the federal government lacked the authority to extradite for thirty-five years. It was not until 1842, when the United States entered into the Webster-Ashburn Treaty with Great Britain, that extradition could properly resume pursuant to treaty. 8 Stat. 572, Treaty Ser. No. 119 (1842).

Due in large part to criticism of the *Robbins* case, the Webster-Ashburn Treaty specifically created the first express role for the judiciary in the extradition process. Id. The role of the judiciary was further formalized through the enactment of congressional legislation creating the position of extradition magistrate, effectively vesting jurisdiction in federal judges, state judges, and commissioners to hear extradition matters and certify individuals for extradition. Act of Aug. 12, 1848, ch. 167, § 5, 9 Stat. 302, 303.

2. Defining the Judicial Role

Congress has conferred authority on the judiciary to become involved in the extradition procedure whenever a treaty or convention is in place providing for extradition between the United States and the requesting nation.[51] Contingent upon the satisfaction of various procedural requirements,[52] members of the federal judiciary sitting as extradition magistrates are authorized to conduct extradition hearings. The purpose of the extradition hearing is not to adjudicate guilt or innocence, but to decide whether the accused can properly be certified as extraditable.[53] In assessing whether the threshold require-

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51. 18 U.S.C. § 3181 (1994 ed.) (providing that the legislative delegation of authority to the executive and judiciary "shall continue in force only during the existence of any treaty of extradition" with the requesting state). See also *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8-9 (1936); *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933) ("[T]he general opinion has heen, and practice has been in accordance with it, that in the absence of a constitutional or legislative provision, there is no authority vested in any part of the government to seize a fugitive criminal and surrender him to a foreign power.") (internal citations and quotation marks omitted).

52. Upon the filing of the formal request for extradition, the Department of State forwards the necessary papers to the United States Attorney in the district where it is believed the accused is residing so that a request can be made to the appropriate judicial officer for a warrant authorizing the arrest of the accused. 18 U.S.C. § 3184. The extradition magistrate is then authorized to issue a warrant "upon complaint made under oath" so that the arrest of the accused may be executed. Id. The complaint may be filed by any person acting with the permission and authority of the foreign state seeking extradition and must fairly apprise the accused of the alleged crime. *In re Wise*, 168 F. Supp. 366, 369 (S.D. Tex. 1957).

Once the extradition magistrato determines these requirements satisfied, a warrant may issue for the arrest of the accused. 18 U.S.C. § 3184. Apprehension of the accused by law enforcement officials ultimately culminates in a determination by an extradition magistrate as to whether the accused can be classified as extraditable. Id. Indigent accused persons may be assigned counsel. See Abbell and Ristau, 4 *International Judicial Assistance* § 13-2-2 at 32-33 (cited in noto 46). A pre-trial release determination is also made on apprehension, prior to the actual extradition hearing. *Wright v. Henkel*, 190 U.S. 40 (1903). Once these procedural requirements have been adequatoly addressed, the process of determining the issue of extraditability commences.

53. In *Benson v. McMahon*, 127 U.S. 457 (1888) the Court commented:

> We are not sitting in this court on the trial of the prisoner, with power to pronounce him guilty and punish him or declare him innocent and acquit him. We are now engaged simply in an inquiry as to whether, under the construction of the act of Congress and the treaty entered into . . . there was legal evidence before the commissioner to justify him in exercising his power te commit the person accused to custody to await the requisition of the [foreign] government.

Id. at 462-63. Similarly, the Fifth Circuit has specified that:

> The accused is not entitled to introduce evidence which merely goes to his defense but he may offer limited evidence to explain elements in the case against him, since the extradition proceeding is not a trial of the guilt or innocence but of the character of a preliminary examination held before a committing magistrate to determine whether the accused shall be held liable for trial in another tribunal.

Jimenez v. Aristeguieta, 311 F.2d 547, 556 (5th Cir. 1962). See also *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911) (characterizing the full contemplation of all evidence as a waste of time for

ment of extraditability has been established, the extradition magistrate is customarily required to consult the applicable treaty provisions and perform three inquiries: (1) whether the offense charged is considered extraditable pursuant to the treaty with the requesting state; (2) whether the offense satisfies the principle of dual criminality; and (3) whether there is probable cause that the accused committed the alleged crime.

The first requirement precludes the United States from extraditing an individual to a foreign nation unless the treaty with that nation specifies the alleged act as extraditable.[54] An extradition treaty may enumerate certain extraditable offenses and exclude offenses not specifically listed. Alternatively, a treaty may adopt an eliminative method, whereby a minimum threshold of punishment is required before the crime will be considered an extraditable offense.[55]

In the latter half of the twentieth century, courts added the further requirement of dual criminality.[56] Dual criminality requires the alleged offense to be characterized as criminal under the laws of both states involved in the extradition proceedings.[57] The principle of dual criminality ensures that each state can rely on corresponding treatment. Moreover, it ensures that no state will be forced to deliver an individual for an action which it does not consider criminal.[58] The

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the extradition magistrate in reliance on the good faith attributed to the requesting government that the accused will receive a fair trial).

54. See Abbell and Ristau, 4 *International Judicial Assistance* § 13-2-4 at 56 (cited in note 46). The primary rationale advanced for the definition of extraditable offenses is to avoid the costly procedure of extradition for fairly minor offenses and to avoid having the requested state decline to surrender the accused on the policy reason that the act is not considered criminal in that state. Bassiouni, 1 *International Extradition* ch. 7 at 333 (cited in note 46).

55. Bassiouni, 1 *International Extradition* ch. 7 at 333-34 (cited in note 46). Bassiouni offers two general methods for determining extraditable offenses. The first involves the formula for ascertaining whether the offense is considered extraditable according to the treaty and the second, relied on in the absence of a treaty, requires a reciprocal recognition of the offense as extraditable by both the requesting and the requested state. Id. Because extradition from the United States must occur pursuant te a treaty, the second option is not available for consideration by the extradition magistrate. For a case involving the interpretation of treaty provisions to determine whether the offense could be characterized as extraditable, see *Melia v. United States*, 667 F.2d 300, 304 (2d Cir. 1981).

56. See, for example, *Wright*, 190 U.S. at 58 ("The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties.").

57. Most of the treaties pertaining to extradition prior to the 1970s do not contain this requirement with respect to all offenses. Typically, such requirements were imposed on specific offenses or certain types of offenses. However, treaties to which the United States became a party after this date began to include the requirement of dual criminality as a preamble to the list of extraditable offenses. Abbell and Ristau, 4 *International Judicial Assistance* § 13-2-4 at 56-57 (cited in note 46).

58. Bassiouni, 1 *International Extradition* ch. 7 at 325 (cited in note 46). See also *Factor*, 290 U.S. at 291 n.3, 292 n.4.

requirement of dual criminality is found in applicable treaty provisions and as a norm of customary international law, rather than in statutes governing extradition procedure in the United States.[59]

Finally, the extradition magistrate examines the quantum of evidence provided by the foreign state in support of its request for extradition.[60] The quantum of evidence required is significantly lower than that required to sustain a criminal conviction[61] and has been compared to a determination of probable cause in a criminal preliminary hearing.[62]

Upon a determination that these factors have been sufficiently satisfied, the extradition magistrate is authorized to certify the accused as extraditable.[63] A finding of extraditability is entered and the Secretary of State is authorized, though not required, to surrender the accused to the requesting state.[64]

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59. *Wright*, 190 U.S. at 58 (referring to both the customary and international law requirement of dual criminality and the requirement imposed by treaty). The Court's determination in *Wright* was displaced in *Factor* as the Court held that absent a specific dual criminality requirement in tbe applicable treaty, none could be inferred. The Court applied the maxim *expressio unius est exclusio alterius* in assessing wbether the treaty at issue contained the dual criminality requirement. Moreover, the Court rejected the contention that customary international law required dual criminality because United States extradition could occur only pursuant to treaty. *Factor*, 290 U.S. at 299-301.

60. Under 18 U.S.C. § 3184, if, on the basis of the extradition hearing, the magistrate "deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same . . . to the Secretary of State . . . ." No section of the statute, however, defines what quantum of evidence is necessary to meet the statutory threshold of "sufficient."

61. *Collins v. Loisel*, 259 U.S. 309, 316-17 (1922). *Collins* is considered the landmark case for establishing the quantum of evidence required to find the accused extraditable. In *Collins*, the Court indicated that "[t]he function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify a conviction." Id. at 316.

Furthermore, neither the Federal Rules of Evidence nor the Federal Rules of Criminal Procedure apply to the extradition hearing. See F.R.E. 1101(d)(3); F.R.Cr.P. 54(b)(5). Moreover, the rules regarding the admissibility of evidence are much stricter for the accused than are the rules for the requesting state. In *Jimenez*, the Fifth Circuit stated, "[t]he accused is not entitled to introduce evidence which merely goes to his defense but he may offer limited evidence te explain elements in the case against him, since the extradition proceeding is not a trial of the guilt or innocence . . . ." 311 F.2d at 556.

The low threshold of evidence and the rules pertaining to evidence are justified on the theory that te require otherwise would necessitate that the requesting state pursue a full trial on the merits in a foreign country and essentially obtain a conviction before extradition would be possible. The low threshold appears then to be more consistent with the obligations incurred by entering into an extradition treaty. *Collins*, 259 U.S. at 316-17.

62. See *Ward*, 921 F.2d at 287-88 (stating that an extradition hearing is akin to a preliminary examination); *Kember*, 683 F.2d at 455.

63. For a broad overview of the extradition hearing, see Bassiouni, 2 *International Extradition* ch. 9 at 545 (cited in note 46).

64. 18 U.S.C. § 3184.

3. The Process of Review

A determination of extraditability is not subject to correction upon direct appeal.[65] The domestic implementing legislation enacted by Congress does not provide for review of the determination of extraditability by such an appeal,[66] and courts have uniformly held that federal legislation authorizing appeal from final decisions of the district courts does not apply to the decisions made by extradition magistrates.[67]

The Supreme Court first addressed the issue of appealability in 1847 in the case of *In re Metzger*.[68] The extradition magistrate had determined that Nicholas Metzger was extraditable upon a full hearing in chambers according to the appropriate provisions of the extradition treaty with France.[69] In denying Metzger's petition for review, the Court characterized the magistrate as acting under a special

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65. Despite the lack of direct appellate review from an adverse determination in an extradition hearing, the accused may file a writ of habeas corpus. The scope of the habeas review is rather limited and extends only te the lawfulness of the order certifying the accused as extraditable and addresses the legality of the detention of the accused. In other words, the scope of review extends only to the determination of whether the magistrate had jurisdiction, whether the offense charged is within the treaty, and whether there was any evidence at all that the accused committed the crime. *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925).

66. See 18 U.S.C. §§ 3181 et seq. See also Abbell and Ristau, 4 *International Judicial Assistance* § 13-2-2 at 41-42 (cited in note 46).

67. Holdings denying appeal pursuant te this rationale refer to 28 U.S.C. § 1291 (1994 ed.) which provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." See, for example, *In re Extradition of Howard*, 996 F.2d 1320, 1325 (1st Cir. 1993). In *Howard*, the court stated:

> In light of this curious arrangement, numerous courts have held that 28 U.S.C. § 1291, which permits appeals of "final decisions of the district *courts*" . . . does not contemplate appeals from decisions of judicial officers sitting in extradition matters. . . . Given the absence of any other hook on which jurisdiction over such appeals can be hung, a putative extraditee customarily can challenge an order for extradition only by collateral attack, typically through habeas corpus.

Id. (internal citations omitted).

68. 46 U.S. 176 (1847). Denial of direct review of the issue of extraditability was first recognized in this case during the year prior to the original congressional legislation formally requiring a judicial presence in the process of extradition.

69. The extradition treaty with France, unlike the Webster-Ashburn Treaty with Britain, did not authorize the judiciary to participate in the extradition procedure. Act of Nov. 9, 1843, 8 Stat. 580. Despite this fact, the President and the Secretary of State chose te submit the extradition request to a district court judge. After considering the matter in chambers, the judge determined that the requisite threshold of extraditability had been met.

Upon commission of the accused as extraditable, Metzger petitioned the Supreme Court for a writ of habeas corpus. The Court dismissed the petition for lack of jurisdiction and stated:

> There is no form in which an appellate power can be exercised by this court over the proceedings of a district judge at his chambers. He exercises a special authority, and the law has made no provision for the revision of his judgment. It cannot be brought before the District or Circuit Court; consequently it cannot, in the nature of an appeal, be brought before this court.

Metzger, 46 U.S. at 191.

authority for which the law made no provision for review. In other words, the extradition magistrate was not relying on Article III judicial power in making the determination of extraditability.

With the Court's holding in *Metzger* fresh in mind, Congress enacted the first federal legislation specifically designed to formalize the judicial presence in the extradition procedure in 1848.[70] While the floor debates on this legislation referred to the Court's holding in *Metzger*, nothing either on the face of the statute or in its legislative history signified any intent to alter the status of appealability.[71] In the wake of the passage of this legislation, the Supreme Court reaffirmed its previous holding pertaining to appealability in the case of *In re Kaine*,[72] where it determined that the Act of 1848 did not substantively alter the right to appeal an adverse determination in an extradition proceeding. The Court relied on the same rationale found in *Metzger*—that the magistrate was not exercising any part of the judicial power of the United States.[73]

Taken together, *Metzger*, the Act of 1848, and *Kaine* provide the cornerstone for the analysis of the power exercised by extradition magistrates and the denial of appealability. Each of the three branches of the federal government has extended support to the theory that the extradition magistrate is not exercising any of the judicial power—or Article III authority—in arriving at the determination of extraditability.[74] Their coinciding contentions have become the primary justifications for denials of appealability.

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70. Act of Aug. 12, 1848, ch. 167, 9 Stat. 302. The legislation passed in 1848 still provides the basic substantative framework for the current extradition legislation. See Abbell and Ristau, 4 *International Judicial Assistance* § 13-2-2 at 41 (cited in note 46).

71. See *United States v. Doherty*, 786 F.2d 491, 495 (2d Cir. 1986); *Mackin*, 668 F.2d at 127.

72. 55 U.S. 103, 120 (1852).

73. The language of Justice Curtis, concurring in the judgment of the Court, typifies the general perception of the extradition magistrate's actions:

> Not only has the law made no provision for the revision of his acts by this court, but, strictly speaking, he does not exercise any part of the judicial power of the United States. That power can be exerted only by Judges, appointed by the President, with the consent of the Senate, holding their offices during good behavior, and receiving fixed salaries. The language of Mr. Chief Justice Taney, in *United States v. Ferreira*, in speaking of the powers exercised by a District Judge, and the Secretary of the Treasury, under the Treaty with Spain of 1819, describes correctly, the nature of the authority of such a Commissioner as acted in the case before us. "The powers conferred by Congress upon the Judge, as well as the Secretary, are, it is true, judicial in their nature. For judgment and discretion must be exercised by both of them. But it is not judicial, in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States."

Id. at 120.

74. In 1853, the Attorney General indicated that "[t]he judge or magistrate in this case acts by special authority under the act of Congress; no appeal is given from his decision by the

B. The Executive Decision to Extradite

The problem with the current extradition framework is not found within the executive's authority to surrender an individual to another nation. Constitutional difficulties arise when the executive reviews an Article III judge's legal determinations and conclusions for correctness prior to surrender. That process renders the judge's opinion non-binding. An additional difficulty arises from the fact that the judge is requested to reach these conclusions after performing an extrajudicial inquiry. This type of relationship between the executive and the judiciary is neither sanctioned by the Constitution nor justified by separation of powers.

1. Executive Involvement: Origins and Rationale

At its simplest level, and separate from the inquiry of extraditability, the surrender of an individual under the auspices of extradition is a national act within the clear purview of the executive branch of the federal government.[75] Indeed, as indicated in the *Robbins* case, at one time, the process of extradition was conducted solely by the executive.[76] Notwithstanding the development of the

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act; and he does not exercise any part of what is, technically considered, the judicial power of the United States." 6 Op. Att'y Gen. 91, 96 (1853). A decade later, the Attorney General again specified that "[i]n cases of this kind, the judge or magistrate acts under special authority conferred by treaties and acts of Congress; and though his action be in form and effect judicial, it is yet not an exercise of any part of what is technically considered the judicial power of the United States. No appeal from his decision is given by the law under which he acts, and therefore no right to appeal exists." 10 Op. Att'y Gen. 501, 506 (1863) (citations omittod).

In accordance with the Executive Branch's considerations of the matter, the Senate Judiciary Committee arrived at a similar conclusion. "[T]he court issuing the writ of habeas corpus is not to retry the case, or pass judgment upon the judgment of a commissioner who has jurisdiction and legal and competent evidence before him .... [W]e could not recommend a provision allowing a review of the whole case, but only such a one as would confine the reviewing judge or tribunal to a [writ of habeas corpus]." S. Rep. No. 82, 47th Cong., 1st Sess. (1882).

All courts, including the Supreme Court, addressing the issue of appealability have concluded that no direct appeal lies from the determination of the extradition magistrate and have based their conclusion on jurisdictional grounds. See *Mackin*, 668 F.2d at 127-28 (examining the historic treatment of appealability and citing cases).

The denial of direct appeal applies equally to the federal government. Because the finding of extraditability is not a final judgment, the magistrate's determination has no res judicata effect. No appeal can therefore be taken from such a finding, and the United States is free to commence the extradition proceedings against the accused without jeopardy having attached. See *Doherty*, 786 F.2d at 503 (denying the existence of an action for declaratory judgment by the government in an extradition matter). Similarly, government attempts at attacking the decision of the extradition magistrate through the use of mandamus and declaratory judgment have proven equally unsuccessful. See id. at 497-98; *Mackin*, 668 F.2d at 130-31 (denying the existence of certification to an appellate court in an extradition matter).

75. Bassiouni, 2 *International Extradition* ch. 9 at 601-02 (cited in note 46).

76. See Part III.A.1.

office of the extradition magistrate, the notion that the power to extradite is a matter of foreign affairs and thus within the executive branch's authority cannot be seriously challenged.[77] The very nature of an executive decision in the area of foreign affairs is political rather than judicial.[78] Extradition epitomizes the need for one unified voice in dealing with matters of national and international importance. The decision to surrender an individual to another nation to stand trial encompasses numerous considerations which other branches of the federal government lack the constitutional competence to undertake.[79] However appealing the inclusion of the extradition magistrate in the extradition process may be to our sense of liberty and fairness, the ultimate authority to extradite is clearly a role for the executive. The decision to extradite is properly confined to the executive branch as neither the legislature nor the judiciary possesses the aptitude, facilities or responsibility to engage in the requisite inquiries accompanying the surrender of an individual to a foreign state.[80]

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77. See Bassiouni, 2 *International Extradition* ch. 9 at 601-02 (cited in note 46) ("The Executive, and in particular the President, conducts foreign affairs, and since the delivery or receipt of a request is to or from another sovereign, it is within the constitutional province of the Executive branch. Similarly, the actual delivery of the relator, and the conditions of his delivery, to a foreign sovereign is also within the province of the Executive branch as a mattor of 'foreign affairs' as defined by the Constitution.").

78. *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948) ("Such [foreign policy] decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative.").

79. In attempting to justify President John Adams's actions in the *Robbins* case, then Representative John Marshall argued:

> [T]he *causus foederis*, under the twenty-seventh article of the treaty with Great Britain, is a question of law, but of political law. The question to be decided is, whether the particular case proposed to be one in which the nation has bound itself to act, and this is a question depending on principles never submitted to courts. The case was in its nature a national demand made upon the nation. The parties were two nations. They cannot come into court to litigato their claims, nor can a court decide them. Of consequence, the demand is not a case for judicial cognizance. The President is the sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him.

10 Annals of Cong., 6th Cong., 1st Sess. 606, 613-14 (Mar. 7, 1800).

80. This does not mean that the executive should be able to pull someone from the street and surrender him to any country requesting his presence to stand trial. While Congress may not possess the competonce to speak for the United States in matters of foreign intercourse, this legislative body certainly has the ability to proscribe, within constitutional limits, the domestic mechanisms through which the individual must proceed prior to surrender by the executive. Consistent with this rationale, the judiciary is equally capable of determining whether compliance with this legislation has been satisfied. However, despite any other inter-branch interaction preceding the moment of surrender, the surrender of an individual must ultimatoly rest within one branch of the federal government, and that branch is the executive.

2. The Origin of the Executive Discretion to Extradite

The inception of the judicial presence in the process of extradition effectively relegated the Secretary of State to a largely ministerial role.[81] The surrender of the accused became largely contingent upon the extradition magistrate's determination of extraditability.[82] At the end of the nineteenth century, however, the Secretary of State began to break from traditional practice and to assert discretion in deciding whether to surrender an individual despite the magistrate's determination of extraditability.[83]

The first judicial recognition of such executive discretion occurred in *In re Stupp*.[84] In *Stupp*, a district court determined that the Secretary of State had the power to refuse the surrender of the individual to the requesting nation.[85] The court interpreted the words "that a warrant may issue" as granting the Secretary of State discretionary power despite a judicial certification of extraditability.[86] In subsequent cases, numerous justifications have been advanced to support the Secretary's refusal to grant surrender. These justifications include humanitarian considerations,[87] political grounds,[88] the nationality of the accused,[89] and the finding of insuffi-

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81. See John Bassett Moore, 1 *Treatise on International Extradition and Interstate Rendition* 361 (1891) (describing the initial extradition framework and roles of the branches of the federal government).

82. Id. See also 4 Op. Att'y Gen. 201, 205 (1843) (indicating that the determination of the extradition magistrate is conclusive and is not to be questioned by the executive).

83. In 1871, seven individuals were certified as extraditable and were to be surrendered to Britain. The Secretary of State, however, surrendered only four out of the seven and offered no reason for the decision not to extradite the other three. See Moore, 1 *Extradition* at 310 (cited in note 81).

84. 23 F. Cases 296 (No. 13,563) (C.C.S.D.N.Y. 1875).

85. The court stated that "[the] refusal [to extradite] was in the exercise of an undoubted right.... Under these provisions of law, the president has undoubtedly the right to refuse to surrender the accused, even though a warrant of commitment for his surrender is issued by the examining magistrate...." Id. at 302.

86. Id.

87. See *Peroff v. Hylton*, 542 F.2d 1247, 1249 (4th Cir. 1976) ("A denial of extradition by the Executive may be appropriate when strong humanitarian grounds are present, but such grounds exist only when it appears that, if extradited, the individual will be persecuted, not prosecuted, or subjected to grave injustice."). See also *Hu Yau-Leung v. Soscia*, 649 F.2d 914, 920 (2nd Cir. 1981) (stating that the United States retains the right to refuse to extradite an individual if doing so would be incompatible with humanitarian considerations).

88. Courts have traditionally refused to inquire into the propriety of the procedures which the foreign government will employ in the adjudication of the accused and have deferred the consideration of this political question to the Secretary of State. Labeled the rule of non-inquiry, the courts have determined this to be a policy determination better made by the executive in such cases. See *In re Lincoln*, 228 F. 70, 74 (E.D.N.Y. 1915) ("[I]t is not a part of the court proceedings nor of the hearing upon the charge of crime to exercise discretion as to whether the criminal charge is a cloak for political action.... Such matters should be left to the Department of State."); *Eain v. Wilkes*, 641 F.2d 504, 516-17 (7th Cir. 1981) ("[T]he

cient evidence to support the judicial determination of extraditability.[90] Despite the existence of a relatively long list of reasons offered to justify the use of discretion by the executive, an executive finding of insufficient evidence most clearly raises separation of powers concerns.

3. Executive Review of the Finding of Extraditability

On its face, the legislation governing extradition does not expressly authorize executive review of the extradition magistrate's determination of extraditability.[91] However, the executive, the legislature and the judiciary have each expressed support for the existence of such executive authority. In each instance, the opinions not only recognize the exercise of discretion, but also explicitly identify the right of the executive to review the magistrate's determination for correctness.

The executive has characterized the discretion to withhold the surrender of the accused in fairly broad terms. In 1881, for example, the Attorney General issued an opinion identifying the extent of executive discretion in reviewing the magistrate's finding.[92] The Secretary of State was said to receive the case from the magistrate on *quasi certiorari* with discretion extending to a review of every question presented therein.[93] Members of the executive branch have perceived this review power as affording the accused the double

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Judiciary's deference to the Executive on the 'subterfuge' question is appropriate since political questions would permeate any judgment on the motivation of a foreign government").

89. See *Valentine*, 299 U.S. at 12-13; *Ex Parte McCabe*, 46 F. 363 (W.D. Tex. 1891) (commenting on the refusal to extradite due to the nationality of the accused).

90. For a discussion of executive determinations that insufficient evidence existed to support the judicial determination of extraditability, see Part III.B.3.

For a more thorough discussion of tbe reasons offered in support of a refusal to extradite, see Abbell and Ristau, 4 *International Judicial Assistance* at 180-311 (cited in note 46); Bassiouni, 2 *International Extradition* ch. 9 at 601-04 (citod in note 46); Note, *Executive Discretion to Extradite*, 62 Colum. L. Rev. 1313 (1962).

91. See notes 12 and 13 for the text of the statute. See also cases cited in note 32 (relying on a plain reading of the statute to avoid finding a separation of powers problem).

92. 17 Op. Att'y Gen. 184, 185 (1881).

93. The Solicitor General indicated that it would be difficult to perceive why the judicial officer should be required to certify the evidence and testimony to the Secretary of State other than to allow for review by the Secretary of State:

> It may be said this is to beg the question, which is, whether the Secretary can look into the evidence for the purpose of passing upon such question; *i.e.*, whether such inquiry be not *coram non judice* as to him. It is upon this point that the express statutory requirement, that the testimony shall be certified to the Secretary, together with the judgment below, is to my mind significant.

Id. at 185-86.

protection of a concurrence of views by both the executive and the judiciary.[94]

The members of the legislature and judiciary have expressed similar support for the concept of executive review. The Senate Judiciary Committee, for example, assessed the proper relationship between the executive and the judiciary in an 1882 report on the appealability of extradition determinations. The Committee concluded that the executive function of surrender necessarily carried with it the power to review the prior proceedings, and ultimately, to pass judgment on their correctness.[95]

Judicial recognition of executive review occurred for the first time in *In re Heilbronn*,[96] decided in 1854. The court observed that if the executive had determined that sufficient evidence did not exist to sustain the magistrate's finding, then the executive had a duty to refrain from surrendering the accused.[97] The text of the opinion seems then to condition surrender upon a mandatory review by the executive.[98]

IV. SEPARATION OF POWERS ANALYSIS

The Framers of the Constitution defined tyranny as the accumulation of all power—legislative, executive, and judicial—in the

94. Id. at 187. ("[T]he law gives to the party charged the double protection of a concurrence of views upon all questions affecting his guilt under the treaty by the magistrate and the Secretary before he is to be surrendered."). The Department of State has similarly commented that the magistrate's decision does not bind the executive, and that, as such, the evidence could be properly reviewed and a contrary determination reached. 3 Dept. of State Legal Advisory Op. 2356, 2357 (1931). It is consistent with this interpretation that the executive has on occasion exercised review over the magistrate's certification of extraditability. See Green Haywood Hackworth, 4 *Digest of International Law* 186-93 (Dept. of State, 1942) (citing cases).

95. Senate Committee on the Judiciary, S. Rep. No. 82 (1882).

96. 11 F. Cases 1025, 1031 (S.D.N.Y. 1854) (No. 6,323).

97. Id.

98. The court stated:

> In such a case no one can revise the opinion of the commissioner but the president. The president has that power. If he should be of the opinion that the evidence taken before the commissioner on the hearing was not sufficient to sustain the charge, then it would be his duty to withhold a warrant of extradition.

Id. at 1031. Similar viewpoints can be found in various other sources. See *Stupp*, 23 F. Cases at 302; Note, 62 Colum. L. Rev. at 1319 (cited in note 90) ("In several cases the executive has grounded a refusal to surrender the fugitive upon the insufficiency of evidence presented in support of the complaint."); Bassiouni, 2 *International Extradition* ch. 9 at 601-04 (cited in note 46).

same hands.[99] They therefore sought to preserve personal liberty through horizontal and vertical separation of powers among different institutions.[100] The Framers therefore created a government with powers distinctly separated among three branches. Though not specifically mentioned in the text of the Constitution, the principle of separation of powers is recognized as implicitly woven into the document's text.[101]

The judiciary is inherently the weakest of the three branches. It lacks both the "power of the sword" and the "power of the purse": unlike the executive, the judiciary exercises no power over the foreign intercourse of the United States, its military, or law enforcement personnel, and unlike the legislature, the judiciary has no authority to levy taxes or appropriate money. For these reasons, the judiciary is generally perceived to be the branch least likely to threaten individual liberty.

The power and influence of the judiciary is derived from the public's need for a tribunal to which all may appeal for the assertion and protection of constitutional rights.[102] This power and influence is further strengthened by the confidence reposed in the soundness of its judgments and the purity of its motives. The judiciary's authority and the public's compliance with its decisions depend on the integrity of its judges and the public's perception of that integrity.[103] In short, the judiciary is highly dependent on the moral force of its judgments.

On several occasions, Congress has attempted to alter the balance of power between the three branches of government. When such efforts have involved the judicial branch, members of the federal judiciary have employed a particularly cautious methodology in evaluating whether the congressional action threatens their ability to

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99. Federalist No. 47 (Madison), in Clinton Rossiter, ed., *The Federalist Papers* 301 (Mentor, 1961).

100. See *Morrison*, 487 U.S. at 685-96; *Bowsher v. Synar*, 478 U.S. 714, 725 (1986). In writing on the subject of separation of powers, Madison indicated "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty." Federalist No. 47 (Madison) in Rossiter, ed., *The Federalist Papers* at 301 (cited in note 99).

101. See *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) ("The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787.").

102. *United States v. Lee*, 106 U.S. 196, 223 (1882) (describing the inherent weakness of the judiciary and its dependency on the moral force of its judgments).

103. *Rushford v. Civiletti*, 485 F. Supp. 477, 479 (D.D.C. 1980) ("In the final analysis, the Judiciary's authority and the general compliance with its decisions depends upon the integrity of the judges and the public's perception of that integrity.").

perform their constitutionally assigned duties.[104] The Supreme Court's approach to separation of powers jurisprudence in this context has been characterized by the competing application of formalist and functionalist ideologies,[105] which can yield inconsistent results. Many commentators have criticized the Court's lack of consistency and reluctance to adopt a single methodology when addressing this issue.[106] Despite the potential inconsistencies and uncertainties encountered in separation of powers cases, both formal and functional analyses demonstrate that the extradition procedure embodied in section 3184 involves an unconstitutional violation of the separation of powers principle.

A. A Formalist Analysis of Extradition

> There is no liberty if the power of the judging be not separated from the legislative and the executive.[107]

The formalist interpretation of separation of powers concentrates primarily on whether a particular branch of the federal government is acting within the scope of authority granted it by the Constitution according to the literal language of that document and the Framers' original intent.[108] The basic foundation of formalism requires the legislature to make, the executive to execute, and the judiciary to construe, the law.[109] Consistent with these principles, formalists interpret the constitution to demarcate the powers assigned to each of the branches of the federal government explicitly.[110]

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104. See *Plaut*, 115 S. Ct. at 1453 (rejecting congressional attempts to reopen final judgments of federal courts); *Chicago & Southern Airlines, Inc.*, 333 U.S. at 111 (rejecting attempts to subject judicial decisions to executive review).

105. See note 8.

106. Id.

107. Montesquieu, 1 *Spirit of the Laws* 181, quoted in Federalist No. 47 (Madison) in Rossiter, ed., *The Federalist Papers* at 302 (cited in note 99).

108. See Brown, 139 U. Pa. L. Rev. at 1523 (cited in note 8) (indicating that formalists "seek judicial legitimacy by insisting upon a firm textual basis in the Constitution for any governmental act").

109. *Wayman v. Southard*, 23 U.S. 1, 46 (1825) ("The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law . . . .").

110. Article I, § 1 indicates "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." Article II, § 2 indicates "The executive Power shall be vested in a President of the United States of America . . . ." Article III, § 1 specifies "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Moreover, Article III establishes a "judicial department" with the "province and duty . . . to say what the law is" in particular cases and controversies. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Furthermore, the text of the Constitution is thought by formalists to define when and to what extent these powers may permissibly commingle.[111]

Formalism demands adherence to the power structure established primarily by the first three articles of the Constitution.[112] For this reason, greater value is assigned to the text of the Constitution than to notions of efficiency, convenience, or flexibility.[113] A formal separation of powers analysis in the extradition context necessarily concentrates on the roles played by the executive and judiciary and focuses on whether these roles are consistent with those contemplated by the Constitution.

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111. Even those who consider themselves formalists cannot disregard Madison's assessment of the principle of separation of powers in Federalist No. 47, when he considered the meaning of Montesquieu's words:

> [H]e did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.

Federalist No. 47 (Madison) in Rossiter, ed., *The Federalist Papers* at 302-03 (cited in note 99).

However, in addressing the implications of Madison's statement, it has been argued that the Constitution defines the extent of permissible commingling of the branches of the federal government through its very terms and that anything beyond its explicit boundaries is impermissible. In this regard, the Constitution is considered a definitive compilation of the acceptable commingling of federal power. The complete and express delineations of permissible commingling of the powers granted by the Constitution include: the Senate's ability te try the impeachment of the executive and judicial officials pursuant to Article I, § 3, cl. 6; the congressional power to define the jurisdiction of the inferior federal courts pursuant to Article III, § 1; the presidential veto pursuant to Article II, § 7, cl. 2; and the senaterial confirmation of executive and judicial appointees pursuant to Article II, § 2, cl. 2. The comminghing of powers beyond those expressly provided for in the Constitution would essentially violate separation of powers. See Arthur C. Leahy, Note, Mistretta v. United States: *Mistreating the Separation of Powers Doctrine?*, 27 San Diego L. Rev. 209, 229-30 (1990) (tracing Federalist Papers 47 to 51 in determining that the entire scope of permissible commingling of functions can be found within the text of the Constitution).

112. See *Bowshor*, 478 U.S. at 726 ("Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches.").

113. See, for example, *INS v. Chadha*, 462 U.S. 919, 958-59 (1983) (stating "it is crystal clear . . . that the Framers ranked other values higher than efficiency" and "we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution"). See also *Morrison*, 487 U.S. at 710-11 (Scalia, J. dissenting); *Myers v. United States*, 272 U.S. 52, 93 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power . . . . The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autecracy.").

1. Formalism and Extradition Procedure

Formal separation of powers requires that the judiciary be entirely free from the control and the coercive influence of the executive.[114] A formal assessment of separation of powers in the context of the extradition procedure requires two separate inquiries. The first examines the propriety of executive review of Article III judicial determinations and the rendition of advisory opinions by these same judges. The second focuses on the legislative requirement that Article III judges serve as extradition magistrates in an extrajudicial capacity.

a. The Issuance of Advisory Opinions and Executive Review of Judicial Determinations

i. The Prohibition Against Advisory Opinions and Extradition

It has been a long-standing policy of the federal judiciary to refuse to issue advisory opinions to the legislature and the executive. This policy is derived from the core of Article III's limitation on federal judicial power.[115] It directly serves the concept of separation of powers by limiting the judicial role to deciding actual disputes rather than giving advice to the Congress or to the President.

This limitation is a constitutional requirement that confines the power of federal courts within proper boundaries and prevents judicial intrusion on the prerogatives of the coordinate branches.[116] By remaining separate, courts offer effective protection from abuses of power and avoid becoming the organs of political theories.[117] The

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114. See *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935) ("The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often heen stressed and is hardly open to serious question.").

115. Article III of the Constitution states: "The Judicial Power shall extend to all Cases . . . [and] Controversies." U.S. Const., Art. III., §§ 1, 2. See *Flast*, 392 U.S. at 96-97 ("[T]he implicit policies embodied in Article III, and not histery alone, impose the rule against advisory opinions . . . . [The rule] implements the separation of powers [and] also recognizes that such suits often 'are not pressed hefore the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests.' ").

116. Laurence N. Tribe, *American Constitutional Law* §§ 3-7 at 67 (Foundation Press 2d ed. 1988).

117. *United Public Workers v. Mitchell*, 330 U.S. 75, 90-91 (1947) (indicating that the issuance of advisory opinions would enmesh the federal courts in political controversies).

issuance of an advisory opinion would involve Article III judges too intimately in the process of policy properly reserved for the executive and legislature, and thereby weaken public confidence in the disinterestedness of the judiciary.[118]

In order for a case to be justiciable and not advisory, two essential criteria must be met. Initially, there must be an actual dispute between adverse litigants.[119] Secondly, there must be a substantial likelihood that the decision rendered by the court will have some effect or bring about some change. This requirement is based on the *Hayburn's Case*[120]—the same case which established the closely related prohibition against executive review of judicial determinations. In *Hayburn's Case*, the Court contemplated whether federal courts could issue non-binding opinions on the amounts of benefits owed to Revolutionary War veterans.[121] In 1792, Congress had enacted a bill designed to provide pension benefits to veterans. The bill granted the federal circuit court judges the authority to assess and grant these benefits, subject to review by the Secretary of War and Congress.[122] Although Congress eventually repealed this part of the bill, the circuit judges sitting on the Supreme Court wrote individually to indicate their reluctance to perform these duties.

Members of the New York, North Carolina, and Pennsylvania Circuit Courts expressed their disapproval of the legislation that Congress had enacted. The members of each court concluded that the powers conferred by Congress could not properly be exercised by an Article III court. The justices explained that the task of making recommendations either to Congress or to the executive was "not of a judicial nature."[123] The rendering of an advisory opinion in this context was deemed radically inconsistent with separation of powers and

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118. *In re Sealed Case*, 838 F.2d 476, 511-12 (D.C. Cir. 1988) (cautioning against the issuance of advisory opinions).

119. This requirement originated in the very early days of the United States. Then-Secretary of State Thomas Jefferson requested that the Supreme Court respond te numerous questions regarding the neutrality of the United States in the war between France and England. The questions concentrated on the meaning of several federal laws and treaties in the context of the war, and President Washington had requested the opinion of the Court on these matters. The justices of the Court refused to respond to the President's request on the grounds that separation of powers prevented the Court from advising another branch of the federal government. Erwin Chemerinsky, *Federal Jurisdiction* 48-49 (Little, Brown, 2d ed. 1994).

120. 2 U.S. 408 (1792).

121. Id.

122. Act of Mar. 23, 1792, ch. 11, 1 Stat. 234-44. The act was entitled "An Act to provide for the settlement of the Claims of Widows and Orphans barred by the limitations heretofore established, and to regulate the Claims of Invalid Persons."

123. *Hayburn's Case*, 2 U.S. at 411.

with the independence of the judicial power vested in Article III courts.[124]

The Supreme Court reached a similar conclusion on the the issuance of advisory opinions in *United States v. Ferreira.*[125] In *Ferreira,* Congress had passed a statute authorizing a federal district court in Florida to hear and adjudicate claims under an 1819 treaty that ceded Florida to the United States from Spain.[126] As in *Hayburn's Case,* the results of the judicial proceedings were to be reported to an executive official, the Secretary of the Treasury.[127] The Secretary would then make the determination as to whether to pay the claims, essentially rendering the opinion by the judge in Florida advisory.[128] The Court determined that the advisory function performed by the judge in this scenario was completely anomalous to the proper Article III functions of the federal judiciary.[129]

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124. The members of the New York Circuit Court, including Chief Justice Jay, Justice Cushing, and Judge Duane, indicated that legislation requring advisory opinions by members of the judiciary would inherently undermine basic structural components of the Constitution based on separation of powers. The judges explained:

> That by the Constitution of the United States, the government thereof is divided into *three* distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either. That neither the *Legislature* nor the *Executive* branches, can constitutionally assign to the *Judicial* any duties, but such as are properly judicial, and to be performed in a judicial manner. That the duties assigned to the Circuit Courts by this act, are not of that description, and that the act itself does not appear to contemplato them as such.

Id.

The members of the North Carolina Circuit Court, including Justice Iredell and Judge Sitgreaves, echoed the concern of the New York court and stated "[t]hat the Legislative, Executive, and Judicial departments, are each formed in a separate and independent manner; and that *the ultimate basis of each is the Constitution only, within the limits of which each department can alone justify any act of authority.*" Id. at 412.

125. 54 U.S. 40 (1851).

126. Id. at 46.

127. Id. at 47.

128. Id.

129. Id. at 48. The Court stated:

> The powers conferred by these acts of Congress upon the judge as well as the Secretary, are, it is true, judicial in their nature. For judgment and discretion must be exercised by both of them. But it is nothing more than the power ordinarily given by law to a commissioner appointed to adjust claims to lands or money under a treaty; or special powers to inquire into or decide any other particular class of controversies in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a Secretary as well as on a commissioner. But is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States.

Id. See also *Chicago & Southern Airlines, Inc.,* 333 U.S. at 113 ("But if the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render. Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned *or refused faith and credit by another Department of Government.*").

The fundamental formalist arguments underlying these opinions are quite clear. Articles I and III of the Constitution have assigned particular functions to the executive and others to the judiciary. Statutes such as those depicted in *Hayburn's Case* and *Ferreira* attempted to subvert the Constitution's assignments. Formalist separation of powers analysis specifically rejects such attempts to blur the lines drawn between the executive and the judiciary.

The extradition statute poses problems that are undeniably similar to those encountered by the Court in *Hayburn's Case* and *Ferreira*. The requirement that a federal judge sitting as an extradition magistrate reach a conclusion concerning the issue of extraditability and then certify this conclusion to the Secretary of State for final consideration closely resembles the duties and roles of the judges in the cases previously examined. From a formalist standpoint, all three situations require the judge to render an advisory opinion to the executive, and all three grant the executive the ultimate authority to review the judge's determination and decide whether to act in accordance with the issued opinion. In essence, the judge's decision is neither final nor binding on the parties at issue in a particular extradition hearing.[130]

The judge is required to make a non-binding certification to a member of the executive branch, who then has the authority to accept the judge's advisement or reject it. An executive decision to disregard the opinion of the extradition magistrate prohibits the requesting nation from obtaining satisfaction of the magistrate's determination. Similarly, because *res judicata* does not attach to the magistrate's conclusion on the issue of extraditability,[131] repeated attempts to extradite the accused can be made. In this regard, an individual facing possible trial in a foreign country following numerous extradition hearings would certainly concur that the opinion of the extradition magistrate was neither final nor binding on the requesting nation. For these reasons, the role contemplated for the federal judiciary by the extradition statute is advisory rather than

130. *Lobue*, 893 F. Supp. at 71. The court indicated "if an extradition judge determines that a particular extradition request may not lawfully be granted, this decision is not legally binding upon either the government or the accused. The government may not appeal the decision. More importantly, however, the extradition judge's determination of non-extraditability has no *res judicata* effect." Id. (citing *Collins*, 262 U.S. at 429-30). See also *Hooker v. Klein*, 573 F.2d 1360, 1364-65 (9th Cir. 1978) (stating that "the government is free to pursue extradition notwithstanding initial unsuccessful efforts").

131. *Matter of Extradition of McMullen*, 989 F.2d 603, 612-13 (2d Cir. 1993) (indicating that "neither the doctrine of *res judicata* nor the fifth amendment protection against double jeopardy would apply [to a determination of extraditability]") (citing *Collins*, 262 U.S. at 430).

dispositive and exceeds the scope of judicial power afforded by the Constitution.[132]

ii. Executive Review and Extradition

Closely akin to the prohibition against the issuance of advisory opinions, formal separation of powers prohibits executive review of judicial determinations. The Court in both *Hayburn's Case* and *Ferreira* considered the permissibility of the executive review scheme in the relevant legislation. In each case, the Court specified that because the Constitution vested the judicial power exclusively in the judiciary, it would be unconstitutional to allow either the executive or the legislature to sit as a court of errors by reviewing judicial judgments.[133] In subsequent cases, the Court has consistently prohibited statutes envisioning either executive or legislative review of judicial determinations.[134]

Decisions of extradition magistrates have been subject to executive review and revision in the past.[135] On numerous occasions, the Secretary of State has determined that the extradition magistrate has reached an erroneous conclusion when issuing a determination that an individual was properly extraditable.[136] Moreover, the statute governing extradition explicitly mandates that the extradition magistrate certify the evidence of extraditability to the Secretary of State.[137] At least one court has made reference to the fact that the delivered evidence comes to the Secretary on *quasi-certiorari*—a conclusion that

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132. See *Plaut*, 115 S. Ct. at 1453 (stating accurately that the judicial power of the United States is the power to render dispositive judgments).

133. *Hayburn's Case*, 2 U.S. at 410; *Ferreira*, 54 U.S. at 48. In *Hayburn's Case*, the Court objected to the prospect of executive review "inasmuch as it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the secretary at war, and then to the revision of the legislature; whereas, by the constitution, neither the secretary at war, nor any other executive officer, nor even the legislature, [is] authorized to sit as a court of errors on the judicial acts or opinions of this court." *Hayburn's Case*, 2 U.S. at 411.

134. See, for example, *Plaut*, 115 S. Ct. at 1453 (stating that "Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch"); *Chicago & Southern Airlines, Inc.*, 333 U.S. at 113 ("Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government."). Montesquieu commented that such a situation enables the executive to act as an oppressor: "Were the power of judging . . . joined to the executive power, *the judge* might behave with all the violence of *an oppressor*." Montesquieu, *The Spirit of the Laws*, in Federalist No. 47 (Madison) in Rossiter, ed., *The Federalist Papers* at 303 (cited in note 99).

135. For a discussion of past executive review and revision of magistrates' extradition determinations, see Parts III.B.2. and III.B.3.

136. Id.

137. 18 U.S.C. § 3184.

necessarily violates separation of powers from a formalist perspective.[138]

The extradition statute essentially allows the whole power of the judiciary in a particular case to be vested in the executive.[139] Furthermore, it fails to take account of the fundamental necessity of keeping each of the branches of government entirely free from the control or coercive influence of the others.[140] Admittedly, this formalist analysis fails to consider the perception that the extradition magistrate relies on a special grant of authority and not an Article III power when making the extraditablity determination.[141] This perception, however, immediately raises another issue: the propriety of extrajudicial service[142] by an Article III judge.

b. The Propriety of Extrajudicial Service

The Constitution explicitly extends to the federal judiciary only the "judicial Power of the United States" and restricts its exercise to "Cases" and "Controversies."[143] The Supreme Court has consequently defined the judiciary's role in terms of a duty to interpret and apply the laws of the United States in cases properly before Article III courts and to resolve controversies between adverse litigants instituted in courts of proper jurisdiction.[144] The case or controversy re-

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138. See *Carreno*, 899 F. Supp. at 631 (referring to a letter written by a former Secretary of State).

139. See generally Federalist No. 47 (Madison) in Rossiter, ed., *The Federalist Papers* at 300 (cited in note 99). In describing the essential attributes of the executive and judiciary in the context of separation of powers, Madison commented "[t]he magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it." Id. at 303. Montesquieu saw these restrictions and others like them as of paramount importance in the prevention of tyranny. From a formalist perspective, however, it appears as though Congress has subverted these requirements by enacting a statute which history has demonstrated allows the executive to review the determinations of the extradition magistrate. While the inclusion of the judiciary in the extradition process may have satisfied those opposed to a unitary executive in total control, the scheme ultimately sacrifices the delineations of executive and judicial power from a formalist standpoint.

140. See *Humphrey's Executor*, 295 U.S. at 629-30 (stressing the importance of such separation).

141. For a discussion of cases relying on such a rationale, see Part III.A.3.

142. Extra-judicial service has been defined as the performance of activities outside the courtroom that are not connected with the Article III judicial office and that do not involve improvement of the legal system embodied and contemplated by Article III. See Mark Scott Bagula and Judge Robert C. Coates, *Trustees of the Justice System: Quasi-Judicial Activity and the Failure of the 1990 ABA Model Code of Judicial Conduct*, 31 San Diego L. Rev. 617, 627-28 (1994).

143. U.S. Const., Art. III, §§ 1, 2.

144. See *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (defining the scope of Article III judicial power); *Muskrat v. United States*, 219 U.S. 346, 361 (1911) (same). See also *United*

quirement thus defines for the judiciary the very idea of separation of powers.[145]

Equally beyond debate is the recognition that the federal courts should carefully abstain from exercising power that is not derived from the specific grant of authority found in the Constitution.[146] Formalists would reject outright Congress's attempt to bypass this requirement by bestowing non-Article III duties on judges rather than courts.[147]

While extrajudicial service is not foreign to members of the federal judiciary,[148] formalism would not accept this past performance as a constitutional authorization of such service.[149] The performance of extrajudicial duties by Article III judges interferes with the performance of constitutionally prescribed judicial duties and has the effect of "undermining the integrity, impartiality, [and] independence of the judiciary,"[150] as well as the language of Article III.

Article III judges serving as extradition magistrates in an extrajudicial capacity are not appointed as separate commissioners completely severed from their judicial moorings. Rather, these judges retain their involvement with the judiciary and are compelled to sit as

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States Parole Comm. v. Geraghty, 445 U.S. 388, 396 (1980). In *Geraghty*, the Court stated, "[t]he case or controversy requirement defines the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to other branches of government." Id. (internal citations and quotation marks omitted). 18 U.S.C. § 3189 does not require that extradition magistrates conduct extradition hearings in courts. Such hearings need only take place on public land. One can only imagine the implications of conducting an extradition hearing in the middle of the tewn square or at the local state university.

145. See *Allen v. Wright*, 468 U.S. 737, 750 (1984).

146. See *Muskrat*, 219 U.S. at 355 (quoting *Gordon v. United States*, 117 U.S. 697, 706 (1864)).

147. See David P. Currie, *Federal Courts: Cases and Materials* 8-10 (West, 2d ed. 1975). In *Hayburn's Case*, some memhers of the Court contemplated performing the requested function individually as commissioners instead of as a court. Professor Currie has commented that "[w]hatever the vice of the pension statute, it is difficult to believe that the trouble was eliminated by the use of a pseudonym." Id. at 8.

148. See generally Robert B. McKay, *The Judiciary and Nonjudicial Activities*, 35 Law & Contemp. Probs. 9 (1970); Peter Alan Bell, Note, *Extrajudicial Activity of Supreme Court Justices*, 22 Stan. L. Rev. 587 (1969-70); Alpheus Thomas Mason, *Extra-Judicial Work for Judges: The Views of Chief Justice Stone*, 67 Harv. L. Rev. 193 (1953). See also Nonjudicial Activities of Supreme Court Justices and Other Federal Judges, Hearings Before the Subcommittee on Separation of Powers of the Committee on the Judiciary, 91st Cong. 1st Sess. (1969). Situations in which federal judges have been authorized to perform extrajudicial service generally extend to matters directly affecting the efficient performance of judicial functions. See *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 84-85 (1970).

149. But see *Matter of President's Commission on Organized Crime Subpoena of Scarfo*, 783 F.2d 370, 375 (3rd Cir. 1986) (finding an inherent distinction between conferring extrajudicial duties on Article III judges individually and placing such duties on courts *qua* courts).

150. See *Code of Judicial Conduct for United States Judges*, Canon 5(g) (Administrative Office of the U.S. Courts, 1987).

extradition magistrates precisely because they are judges. Moreover, the judicial branch is directly implicated by the very nature of the task that the extradition magistrate is to perform. The extradition magistrate is required to interpret treaty provisions, assess and weigh evidence, and apply principles of law to facts. From a formalist standpoint, simply renaming the Article III judge as an extradition magistrate and specifying that the magistrate is functioning in an extrajudicial capacity is not sufficient to alleviate the problems encountered in the extradition procedure.

2. Assessing the Formalist Analysis

The formalist perspective admittedly restricts the federal government from responding creatively to unique issues like extradition. Declaring the extradition law unconstitutional from this perspective would also temporarily cripple the United States's ability to adhere to its international obligations, thereby impacting other areas of American foreign policy. However, reliance on a formalist analysis safeguards the text of the Constitution, the Framers' intent, and the integrity of the federal judiciary—three features of the American political structure that most would agree are worth protecting.

B. A Functional Analysis of Extradition Procedure

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.[151]

The functional approach to separation of powers concentrates on whether an action performed by one branch impermissibly interferes with a core function of another.[152] Functionalism makes allowances for the sharing of powers among the branches of the federal government to the extent that the basic principles of separation of powers are preserved.[153] Consistent with this approach,

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151. *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring).

152. See *Bowsher*, 478 U.S. at 776 (White, J., dissenting) ("[T]he role of this Court should be limited to determining whether the [the act at issue] so alters the balance of authority among the branches of government as to pose a genuine threat to the basic division between the lawmaking power and the power to execute the law.").

153. See *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977). In *Nixon*, the Court rejected the notion that separation of powers required "three airtight departments of government" and stated:

functionalism envisions certain extra-constitutional commingling or shifting of powers as essentially endorsed by the drafters of the Constitution.[154]

In essence, functionalism requires a determination of whether a particular practice undermines central constitutional commitments.[155] The text of the Constitution and the intent of the drafters, while relevant, give way to the basic structural values and functions of the Constitution.[156] Functionalists encourage judicial restraint and afford a greater degree of deference to the scenarios and schemes created by the two majoritarian branches of the federal government.

A drawback of the functional perspective is the difficulty a judge or court faces in determining the values and functions that are central to the Constitution and the extent to which these can be altered in any given situation.[157] For this reason, critics of a functional approach point to the potential unpredictability and indeterminacy in its ad hoc analysis of separation of powers issues.[158]

> [I]n determining whether [a situation] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents [a branch of the federal government] from accomplishing its constitutionally assigned functions.... Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of [another branch].

Id. Moreover, at one time during the early history of the United States, Congress rejected the addition of a new article to the Constitution which would have definitively specified the extent to which powers were to be divided. This article, proposed by James Madison, mandated that:

> The powers delegated by this constitution, are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial; nor the executive exercise the powers vested in the legislative or judicial; nor the judicial exercise the powers vested in the legislative or executive departments.

Charles F. Hobson and Robert N. Rutland, eds., 12 *The Papers of James Madison* 202 (U. of Virginia, 1979).

154. There is support for such a view in the writings of the Framers. See Federalist No. 47 (Madison) in Rossiter, ed., *The Federalist Papers* at 301 (cited in note 99) (specifying that the separation of powers did not mean that the branches of the federal government were intended to remain hermetically sealed). See also *Morrison*, 487 U.S. at 694 ("[The Court has] never held that the Constitution requires that the three branches of Government 'operate with absolute independence.' ").

155. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 495 (1987).

156. Brown, 139 U. Pa. L. Rev. at 1528 (cited in note 8). These basic values have been referred to as the unitary execution of laws, the avoidance of factionalism, protection against self-interested or unaccountable representation, and promotion of deliberation in government. Sunstein, 101 Harv. L. Rev. at 495-96 (cited in note 155).

157. See Sunstein, 101 Harv. L. Rov. at 494-96 (cited in note 155).

158. See, for example, Brown, 139 U. Pa. L. Rev. at 1528 (cited in note 8); Stephen L. Carter, *Constitutional Improprieties: Reflections on* Mistretta, Morrison, *and Administrative Government*, 57 U. Chi. L. Rev. 357, 375-76 (1990).

With these possible criticisms in mind, however, conducting a functional analysis of the extradition procedure requires a determination of the constitutional values and functions at issue and an assessment of whether these values and functions are impermissibly threatened by the roles the executive and judiciary are expected to perform.

1. Functionalism and Extradition Procedure

At first glance, extrajudicial service and executive review appear to be permissible under a functional approach to separation of powers. The combination of extrajudicial service and executive review allows the presence of a judicial decisionmaker to legitimize the extradition procedure, while still affording the executive complete control over the ultimate decision to extradite. Closer inspection, however, reveals that the values furthered by extrajudicial service and the standards demarcating the extent of its propriety fail to authorize the extrajudicial function performed by a federal judge as an extradition magistrate. Consequently, even a functional approach to separation of powers makes it clear that the United States extradition procedure is unconstitutional.

a. The Functional Justification For Extrajudicial Service

The propriety of extrajudicial service depends on viewing separation of powers as applying to institutions rather than individuals.[159] The Constitution contains only one express incompatibility clause, a clause precluding legislators from performing joint service in another department of the federal government.[160] No similar constitutional provision precludes federal judges and justices from serving in an extrajudicial capacity.[161] Thus, functionalists look to

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159. See Solomon Slonim, *Extrajudicial Activities and the Principle of the Separation of Powers*, 49 Conn. Bar J. 391, 408-10 (1975). In assessing Madison's statement in Federalist No. 47 that separation of powers is violated only when the whole power of one department is exercised by the same hands that possess the whole power of another department, Professor Slonim indicates that "[i]t follows from this that an individual in one department of government who belongs to, or exercises the powers of a different department does not thereby violate the principle of the separation of powers." Id. at 408. From this perspective, the separation of powers inquiry turns on what scope the drafters intended this doctrine to have. Id. See also Stephen G. Calabresi and Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 Cornell L. Rev. 1045 (1994) (considering separation of powers as institutional rather than personal).

160. U.S. Const. Art. I, § 6, cl. 2.

161. See *Mistretta*, 488 U.S. at 397-98 ("The text of the Constitution contains no prohibition against the service of active federal judges on independent commissions .... The Constitution

whether the integrity, impartiality, or independence of the judiciary will be compromised by the performance of a particular extrajudicial function.[162]

Prior to its express authorization of extrajudicial service in *Mistretta v. United States*,[163] the Supreme Court and other lower courts had alluded to the permissibility of the performance of extrajudicial functions on several occasions. The Court's consideration of the statute at issue in *Hayburn's Case* demonstrated that members of the original executive and legislative departments believed that federal judges could constitutionally hold executive positions or perform executive duties in an extrajudicial capacity.[164] Similarly, in *Ferreira*, the Court alluded to the fact that a federal district judge in Florida could perform as a commissioner in an extrajudicial capacity.[165] In each case, the prospect of executive review of the extrajudicial function performed by the commissioner appeared not to offend the Court's notions of separation of powers.[166]

This reading of *Hayburn's Case* and *Ferreira* has subsequently been afforded support by courts when undertaking a separation of powers analysis of extrajudicial service. In *Matter of the President's*

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does include an Incompatibility Clause applicable to national legislators .... [However], [n]o comparable restriction applies to judges.").

162. See id. at 381 (considering the propriety of extrajudicial service by federal judges on the Federal Sentencing Commission); *Nixon*, 433 U.S. at 433; *Code of Judicial Conduct for United States Judges*, Canon 5(g) ("A judge should not ... accept such an [extrajudicial] appointment if the judge's governmental duties would interfere with the performance of judicial duties or tend to undermine the integrity, impartiality, or independence of the judiciary.").

163. 488 U.S. 361 (1989).

164. *Hayburn's Case*, 2 U.S. at 410. The members of the New York Circuit Court expressed this view and stated:

> As, therefore, the business assigned to this court, by the act, is not judicial, nor directed to be performed judicially, the act can only be considered as appointing commissioners for the purposes mentioned in it, by *official* instead of *personal* description. That the judges of this court regard themselves as being the commissioners designated by the act, and therefore, as being at liberty to accept or decline that office. That as the objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of congress; and as the judges desire to manifest, on all proper occasions, and in every proper manner, their high respect for the national legislature, they will execute this act in the capacity of commissioners.

Id.

165. *Ferreira*, 54 U.S. at 47.

166. Id. Chief Justice Taney found no "ground for objection to the power of revision and control given to the Secretary of the Treasury." This belief expressed by Justice Taney hinged on the notion that the power utilized by the district court judge, although in form and effect judicial, did not originate in Article III of the Constitution. Id. at 46-47. It should be noted, however, that in neither *Hayburn's Case* nor *Ferreira* did the Supreme Court directly reach the issue of extrajudicial service or executive review. In *Hayburn's Case*, Congress repealed the statute prior to the Court's consideration of the issue and in *Ferreira*, the Court dismissed the case for lack of jurisdiction.

Commission on Organized Crime Subpoena of Scarfo,[167] the Third Circuit explicitly stated that the language used by the Supreme Court in *Ferreira* could be interpreted to allow the imposition of extrajudicial duties on Article III judges individually—"duties that under the separation of powers doctrine [could] not be imposed on the courts *qua* courts."[168] Moreover, in *Mistretta v. United States*, the Supreme Court indicated that "*Ferreira*, like *Hayburn's Case*, suggests that Congress may authorize a federal judge, in an individual capacity, to perform an Executive function without violating separation of powers."[169]

The role and actions of the extradition magistrate appear to be consistent with other examples of extrajudicial service.[170] Authority to hear extradition matters was bestowed upon the judges and justices of the federal courts individually and not as courts.[171] This is comparable to the authority granted to the members of the judiciary in the cases previously considered.[172] This consistency, however, does not automatically equate to constitutionality. Though decidedly more flexible than formalism, even the functional approach to separation of powers defines certain limits regarding the permissible extent of extrajudicial service.

b. The Propriety of Extrajudicial Service

A functional approach to separation of powers requires a determination as to whether the act in question so alters the balance of

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167. 783 F.2d 370 (3d Cir. 1986).

168. Id. at 375. The Third Circuit considered whether it was permissible for federal judges to sit on a commission located in the executive branch. The court concluded that the participation of the judges on this commission did not violate principles of separation of powers. Id. at 381. Compare *Application of President's Commission on Organized Crime Subpoena of Scaduto*, 763 F.2d 1191 (11th Cir. 1985) (finding the judges' participation on the Commission to violate separation of powers).

169. *Mistretta*, 488 U.S. at 403. In characterizing the actions of the federal judges in serving as commissioners on the Federal Sentencing Commission, the Court also stated:

> The judges serve on the Sentencing Commission not pursuant to their status and authority as Article III judges, but solely because of their appointment by the President as the Act directs. Such power as these judges wield as Commissioners is not judicial power; it is administrative power derived from the enabling legislation .... In other words, the Constitution, at least as a *per se* matter, does not forbid judges to wear two hats; it merely forbids them to wear both hats at the same time.

Id. at 404.

170. The Act of Oct. 17, 1968 amended the extradition legislation and substituted the word "magistrate" for "commissioner" in the statute.

171. 18 U.S.C. § 3184. The statute confers authority to hear extradition matters directly on "any justice or judge of the United States" and makes no mention of conferring jurisdiction on a particular court.

172. See *Ferreira*, 54 U.S. at 49; *Hayburn's Case*, 2 U.S. at 409 n.1.

power among the three branches of government as to pose a genuine threat to the basic constitutional divisions.[173] The analysis concentrates on whether the action of one branch impermissibly interferes with the core functions of another.[174] In cases pertaining to the propriety of extrajudicial service, the Supreme Court's holding in *Mistretta* has fashioned a vague and flexible standard allowing this service to be considered on a case-by-case basis.[175] The two-part inquiry fashioned by the *Mistretta* Court contemplates: (1) whether the function assigned to the judicial branch would be better accomplished by either the legislature or executive;[176] and (2) whether the assigned function impermissibly threatens the institutional integrity of the judicial branch.[177]

i. The Location of the Position of Extradition Magistrate Within the Judicial Branch

In its assessment of whether the Federal Sentencing Commission was properly located in the judicial branch, the *Mistretta* Court initially commented that the location of the body within the judiciary would not violate separation of powers unless the powers vested in the Commission would be more appropriately performed by the other branches or undermine the integrity of the judiciary.[178] The Court noted that, as a general principle, executive or administrative duties of a non-judicial nature could not be imposed on judges holding

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173. *Bowsher*, 478 U.S. at 776 (White, J., dissenting).

174. Id.

175. *Mistretta*, 488 U.S. at 381. The Court relied on its functional treatment of separation of powers in the past and commented that the drafters of the Constitution did not require and rejected the notion that the three branches remain entirely separate and distinct. See *Nixon*, 433 U.S. at 433 (rejecting as archaic the complete division of authority among the three branches).

Prior to the conclusion reached in *Mistretta* explicitly authorizing extrajudicial service, the Court had contemplated the issue of extrajudicial service very infrequently. The *Mistretta* Court considered whether it was permissible for federal judges to serve on the Federal Sentencing Commission for the purpose of creating sentencing guidelines for the federal courts. The Commission has been described as an administrative agency composed of seven members appointed and removable by the President. Individuals challenging the constitutionality of the Commission made the argument that the Commission violated separation of powers by requiring federal judges to perform duties outside the scope of Article III in an extrajudicial capacity. In holding that the Constitution did not require the three branches of the federal government to remain entirely distinct, the Court cleared the way for its declaration that extrajudicial service was not barred by separation of powers. The Court determined that a functional approach to separation of powers should be utilized when considering the permissible scope of extrajudicial service and fashioned a two-part inquiry to guide this examination.

176. *Mistretta*, 488 U.S. at 383 (quoting *Morrison*, 487 U.S. at 680-81).

177. Id. (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 855 (1986)).

178. Id. at 384-85.

office under Article III of the Constitution.[179] The Court also recognized, however, that this rule was not without exception.[180] The Court's primary focus then became assessing the practical consequences of locating the Sentencing Commission in the judicial branch.[181]

In making this examination, the Court concentrated on whether the placement of the Sentencing Commission in the judicial branch undermined the integrity of the judiciary or expanded the powers of the judiciary beyond constitutional bounds by uniting the judiciary with the political or quasi-legislative power of the office of commissioner.[182] Unlike the Sentencing Commission,[183] however, the location of the office of extradition magistrate within the judiciary has several practical consequences which mix the non-Article III power of the extradition magistrate with the Article III power inherent in the position of a federal judge. This, in turn, contributes to a deterioration of the integrity of the judicial branch as a whole.

In creating the position of extradition magistrate, Congress has essentially united a supposed non-Article III power with Article III power for the purpose of effectuating extradition. Congress has asked federal judges to rely on their inherent Article III authority to interpret treaties and to apply their conclusions to the facts of the extradition matter before them.[184] By failing to divorce the role of the Article III judge completely from that of the extradition magistrate, Congress has impermissibly expanded the power and authority of the federal judiciary beyond its intended scope.[185] Furthermore, it ap-

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179. Id. at 385 (quoting *Morrison*, 487 U.S. at 677).

180. Id. at 386. See, for example, *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) (upholding a challenge to rules promulgated under the Rules Enabling Act of 1934).

181. *Mistretta*, 488 U.S. at 393 ("Our separation-of-powers analysis does not turn on the labeling of an activity as 'substantative' as opposed to 'procedural' or 'political' as opposed to 'judicial' .... Rather, our inquiry is focused on the 'unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III.").

182. Id.

183. The Court indicated that "since substantative judgment in the field of sentencing has been and remains appropriate to the Judicial Branch, and the methodology or rulemaking has been and remains appropriate to that branch, Congress's considered decision te combine these functions in an independent Sentencing Commission and to locato that Commission within the Judicial Branch does not violate the principle of separation of powers." Id. at 396-97.

184. The extradition magistrate is required te interpret the applicable extradition treaty to determine whether the offense is extraditable and whether the principle of dual criminality has been satisfied. See Part III.A.2. Because treaties are considered the "Supreme Law of the Land" according to the Constitution, the judiciary has the authority to interpret treaties that have been ratified by the Senate whenever such treaties are relevant to a dispute before the court. U.S. Const., Art. VI, § 2. See also *United States v. Decker*, 600 F.2d 733, 737 (9th Cir. 1979) (commenting that the judiciary is responsible for interpreting treaties).

185. The Court in *Mistretta* reached a different conclusion: "[A]lthough the Commission is located in the Judicial Branch, its powers are not united with the powers of the Judiciary in a

pears that in performing the function of extradition magistrate, the federal judge becomes accountable both to other members of the federal judiciary and to the executive.[186]

Although *Mistretta* and *Ferreira* can be relied upon to justify the authorization of a federal judge to perform executive or administrative functions, these cases do not support the proposition that a federal judge may perform an entirely judicial function in an extrajudicial capacity pursuant to a grant of authority beyond the scope of Article III. *Mistretta* and *Ferreira* permit federal judges to perform executive functions completely separate from their traditional functions—adjusting claims and establishing sentencing guidelines. As an extradition magistrate, by contrast, a judge is required to exercise *judicial* power pursuant to Article I and Article II. Even the flexible, functional language of *Mistretta* explicitly prohibits federal judges from wearing the executive or administrative "hat" and the judicial "hat" simultaneously.[187] In the context of extradition, the extradition magistrate has failed to remove the judicial hat before donning a new one.

Service as an extradition magistrate also permits an Article III judge to exercise a greater degree of political judgment than is appropriate for a non-political branch.[188] This exercise of political judgment can be seen in the fact that the magistrate is given discretion to invoke the political offense exception in determining whether an individual is extraditable.[189] Once the magistrate refuses to certify

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way that has meaning for separation-of-powers analysis." The Court explicitly stated that the Sentencing Commission did not exercise judicial (Article III) power. *Mistretta*, 488 U.S. at 393. As noted, this is markedly different from the function that the extradition magistrate is expected to perform.

186. The Court in *Mistretta* specified that the Sentencing Commission was not controlled by the judicial branch and subject to the President's limited powers of removal. Id. The extradition statute contemplates both executive and judicial control of the action of the extradition magistrate in the form of review by the Secretary of State and habeas corpus review by the judiciary.

187. *Mistretta*, 488 U.S. at 404.

188. Compare *Mistretta*, 488 U.S. at 396. In commenting on the impact of the Commission on the Judiciary, the Court noted, "[n]or do the Guidelines, though substantative, involve a degree of political authority inappropriate for a nonpolitical Branch." The Court also added, "[the rules] do not bind or regulate the primary conduct of the public." This is not the case in the context of extradition, as the extradition magistrate's actions authorize the executive to surrender an individual to a foreign state to stand trial.

189. The political offense exception allows the judge determining the issue of extraditability to refuse certification on the ground that the offense is an act directed against the security of the state. Refusal to certify an individual as extraditable on this ground is based on the apprehension that the surrender of political criminals to stand trial in the courts of the accusing state would be to subject the individual to being tried and punished by tribunals colored by political passion. Manuel R. Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 Va. L. Rev. 1226, 1226 (1962).

the accused as extraditable on this ground, the determination cannot be reviewed by the executive. It could be argued that in invoking the political offense exception, the magistrate is making what can only be called a political decision in situations where all other extradition requirements have been met.[190] Such political power is especially troubling because the accountability of a non-elected, non-majoritarian extradition magistrate is virtually non-existent.

The location of the position of extradition magistrate in the judiciary also eliminates accountability in another important respect. When the Secretary of State makes a foreign policy determination, the public should be afforded the opportunity to hold this individual accountable. When a foreign policy determination is involved in a decision to extradite, the Secretary of State can easily claim that the law did not permit extradition of the accused. This could be achieved very simply by permitting the Secretary to review the conclusions of the extradition magistrate, whether or not such review were actually undertaken. Such deception of the public compromises the integrity of the judiciary, and the public is unable to hold the Secretary of State accountable for any consequences resulting from the refusal to extradite.[191]

In light of these considerations, the location of the position of the extradition magistrate in the judiciary violates functional separation of powers standards set forth in *Mistretta* by expanding the powers of the judiciary beyond constitutional limitations. It unites the political power of the executive branch and the non-Article III judicial power of the extradition magistrate with the judicial power of the Article III judge and eliminates any degree of accountability for the Secretary of State.

ii. Service as an Extradition Magistrate

Because the location of the Sentencing Commission in *Mistretta* did not violate separation of powers, the Court went on to consider whether the composition of the Commission could also survive constitutional scrutiny. Consideration of this issue essentially focused on whether service on the Sentencing Commission would

190. There has been a general movement to transfer the discretionary power to determine political offenses from the extradition magistrate to the executive. See *Eain v. Wilkes*, 641 F.2d 504, 513-18 (7th Cir. 1981).

191. *Lobue*, 893 F. Supp. at 76.

undermine the integrity of the judiciary.[192] Although the Court in *Mistretta* found this not to be the case, the same cannot be said of the extrajudicial service of the extradition magistrate.

It cannot be disputed that the judicial power of the federal courts extends only to the adjudication of cases and controversies. Equally beyond debate is the consideration that the federal courts shonld carefully abstain from exercising any power that is not strictly judicial in its character and derived from Article III of the Constitution.[193] These considerations are based on the fact that the judiciary relies on the reputation of its members as a means to promote its effectiveness.[194] This effectiveness is seriously jeopardized by the required performance of duties as extradition magistrates.[195]

The prospect of executive review challenges the integrity of the judiciary. The blending of Article III functions with the non-Article III judicial functions contemplated by the extradition statute makes it difficult to discern when the judge is acting as an extradition magistrate and when the judge is acting as a member of an Article III court. This inability to distinguish the actions of the judge is expressly contemplated and rejected by *Mistretta*'s "two hat" analogy. The judiciary's dependence upon the moral force of its judgments is substantially undercut if the public perceives that these judgments are not given full credit by other branches of the government even if the judge is acting in an extrajudicial capacity. Furthermore, the judiciary's involvement in the process of making a foreign policy determination weakens public confidence in the disinterestedness of the judiciary.[196]

Therefore, both the location of the office of extradition magistrate in the judicial branch and the requirement that federal judges serve in an extrajudicial capacity offend the principle of separation of

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192. *Mistretta*, 488 U.S. at 668-74. The Court first stated that the concept of extrajudicial service was not expressly prohibited by the Constitution. In reaching this determination, the Court compared the incompatibility clause found in Art. I, § 6, cl. 2 (prohibiting extra-legislative service by members of Congress) with the lack of such a clause in Article III. Second, the Court identified numerous examples of extrajudicial service throughout the judicial history as evidence that such practice is not prohibited by the Constitution. Finally, the Court cited the fact that the judges would be acting individually and not as courts. *Mistretta*, 488 U.S. at 397-408.

193. See *Muskrat*, 219 U.S. at 355.

194. *Rushford*, 485 F. Supp. at 479.

195. The Court in *Mistretta* emphasized the voluntary nature of federal judges' service on the Federal Sentencing Commission. 488 U.S. at 405-06. Service as an extradition magistrate appears to be mandatory according to the text of the statute governing the procedure. See 18 U.S.C. § 3184.

196. See Felix Frankfurter, *Advisory Opinions*, in 1 *Encyclopedia of the Social Sciences* 475, 478 (1930).

powers. For these reasons, the current U.S. extradition procedure is unconstitutional according to a functional analysis.

2. Assessing the Functional Analysis

As a general principle, extreme caution should be utilized in attempting to justify an expansion of the duties of an Article III judge in a extrajudicial capacity, even under a functional analysis. In the context of extradition, Congress has created a system which eliminates the potential for appellate review and accountability by describing the actions taken by a federal judge as extrajudicial. This not only undermines the integrity of the judiciary, but also forces members of the judiciary to consider purely political matters. The prospect of review of a judge's extraditability determination relegates the judiciary to the status of a political pawn enabling the Secretary of State to sacrifice the integrity of the judiciary to mask an underhanded political decision.[197]

The inherent strength of a functional approach to separation of powers is the ability to allow the government to create unique answers to unique problems. Instead of developing a pragmatic solution to the unique problem of extradition, however, Congress has essentially compromised the constitutional principle of separation of powers.

C. Rethinking Extradition: Thoughts on a Constitutional Solution

The act of surrendering an individual to a foreign state pursuant to an extradition treaty is a purely executive function. This must continue to be the overarching concern of any reconsideration of the extradition statute. No statute should bind the Secretary of State to deliver an individual to a requesting state simply because an individual is certified as extraditable. However, the statute should balance the competing concerns of separation of powers, individual liberty, and United States foreign policy. Achieving this end requires contemplation of a fundamental recharacterization of the roles played by each of the branches. A comparative valuation of the competing desires—final executive authority in determining whether to surren-

197. See Abbell and Ristau, *International Judicial Assistance* § 13-3-8 at 260 (cited in note 46). The authors indicate that "on only two occasions since 1950 has the Secretary refused to issue a warrant for the surrender of a person found extraditable. In each of those instances, he based his refusal on a disagreement with the courts as to whether the treaty permitted extradition, not on his discretionary power to deny extradition for unspecified reasons." In both of these cases, denial based on review was perceived to be a cover for policy-driven motives.

der an individual to the requesting nation and involvement of the judiciary in determining extraditability—is necessary in order to fashion a workable result.

1. Scenario 1: Vesting Article III Courts With Jurisdiction Over Extradition

It can be argued that the extradition statute enacted in 1848 vested jurisdiction in the federal courts and not in the judges and justices individually. Because this statute was enacted prior to the grant of general federal question jurisdiction in 1875,[198] it was necessarily a specific grant of jurisdiction.[199] Cases decided in other contexts have expressly interpreted such grants of jurisdiction as extending to courts and not to judges individually.[200] The manner in which federal judges handle extradition matters is consistent with this interpretation as well. The dockets and federal courtrooms of the federal judicial system are specifically utilized to conduct extradition hearings.[201]

Recognizing a jurisdictional grant of authority conferred on federal courts to hear extradition matters contemplates a complete severance of the judicial and executive roles. Extradition matters should proceed through the court's civil docket and require the requesting state to establish by a certain level of evidence that the accused committed the alleged crime. The standard of proof should reflect the lower level of proof traditionally required in extradition matters while affording the accused sufficient protection and due process before he or she is removed from the United States to stand trial before a foreign tribunal without any guarantee of the safeguards found within the United States legal system. Additionally, the complete appellate process should be available to the accused, including direct and collateral review, with res judicata attaching to the final extraditability determinations.

Executive discretion in determining whether to extradite the accused should be limited in only one regard—the Secretary of State

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198. Act of March 3, 1875, 18 Stat. 470. This Act granted federal courts jurisdiction over cases arising under the Constitution, treaties, and federal law.

199. The original statute mandated that extradition judges were "hereby severally vested with power, jurisdiction, and authority" over extradition matters. Act of Aug. 12, 1848, ch. 167, 9 Stat. 302, 302.

200. See *In re United States*, 194 U.S. 194, 196 (1904); *Chin Bak Kan v. United States*, 186 U.S. 193 (1902).

201. Compare *Ferreira*, 54 U.S. at 51 (indicating that extrajudicial matters can neither "remain in the District Court, nor . . . be recorded there").

should not be allowed to refuse surrender upon proper reconsideration of the case before the Article III court. This would not handcuff the Secretary in terms of refusing surrender because of the vast number of reasons available to the Secretary beyond review of the judge's determination.[202]

If this scheme were adopted, the liberty interest in having a judicial presence involved in the extradition process would be satisfied. Further, very little control over the extradition process would be sacrificed by the executive.

2. Scenario 2: Vesting Administrative Agencies With Authority To Hear Extradition Matters

As an alternative, the power of the executive could be best maximized and best served if the authority to determine the issue of extraditability were vested in an administrative agency within the Department of State. Full administrative hearings could be conducted before the agency and extraditability could be determined by an adminstrative law judge. The competing, though essentially subordinate, need for judicial involvement in the process would then be satisfied by the process of habeas corpus review. In this respect, the prospect of executive review would be eviscerated, as the determination of extraditability would emanate from an adjudicatory determination within the executive branch. In today's administrative-oriented society, such a scenario would hardly be considered an anomaly. Moreover, the prospect of extrajudicial service would be eliminated, as the judiciary would be restricted to serving in its traditional capacity.

V. CONCLUSION

The current United States extradition statute is not exactly a model of clarity. Examination of the process demonstrates that Congress's attempt to appease the interests of both the judiciary and the executive has resulted in a violation of separation of powers, whether one relies upon a formal or functional analysis. Although the prospect of executive review can inure only to the benefit of the

202. See Part III.B.2.

individual awaiting extradition, the broader implications of such review, when combined with the realities of extrajudicial service, result in a process that cannot withstand separation of powers scrutiny.

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